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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,

Appellant,

vs.

J. A. KIRCHWEHM.

APPEAL FROM THE SUPREME COURT OF OHIO.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to Rule 12 of the Supreme Court of the United States, and the appellant herewith submits this separate statement disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment and decision of the Supreme Court of Ohio in the above entitled cause.

STATUTORY PROVISIONS RELIED ON AND BELIEVED TO SUSTAIN JURISDICTION.

This appeal is authorized by the United States Code, Title 28, Section 344a; Section 237a of the United States

Judicial Code, as amended by the Acts of February 13, 1925 (Chapter 229, 43 Stat. 936) and January 31, 1928 (Chapter 14, 45 Stat. 54) and April 26, 1928 (Chapter 440, 45 Stat. 466) relating to this Court's obligatory appellate jurisdiction on appeals from a state court of last resort.

OHIO STATUTES THE VALIDITY OF WHICH IS INVOLVED.

The aforesaid statute, 28 U. S. C. 344a, confers jurisdiction on this Court because the instant judgment draws into question the validity of Sections 32, 11221 and 11234 of the General Code of Ohio (which statutes are hereafter set out *verbatim*), in that each of these statutes, as construed, applied and given effect by the instant decision, is repugnant to several provisions of the Federal Constitution; and the decision was, nevertheless, in favor of their validity, as so construed and applied.

DATES OF FINAL JUDGMENT AND OF APPLICATION FOR APPEAL.

The judgment to be reviewed was entered by the Supreme Court of Ohio on April 21, 1943 and then became final. An application for rehearing was timely filed by appellant as of right and was overruled without opinion on May 12, 1943. A Petition for Appeal was then presented to Hon. Carl V. Weygandt, Chief Justice of Ohio, on July 17, 1943, and by him then allowed.

NATURE OF THE CASE.

Cause of Action.

The action is by a mortgagee, and arises out of the refusal of defendant, a grantee of Florida real estate, to pay the mortgage debt which the deed recited that the grantee assumed and agreed to pay.

Facts and Pleadings.

On May 15, 1925, defendant, J. A. Kirchwehm, a resident of Ohio, who never was within the State of Florida, became the grantee of Florida real estate by deed from Charles Gordon, which he recorded and which recited that it was given for good and valuable consideration, subject to specified mortgages "which the grantee herein assume and agree to pay". Five Thousand Dollars of this mortgage debt became due December 24, 1926 and Five Thousand Dollars on December 24, 1927; no part thereof was paid.

On October 16, 1941, less than 15 years after the first installment became due, V. D. Payne, the owner of the mortgage in question, a resident of Florida, instituted suit in the Court of Common Pleas of Cuyahoga County, Ohio, to recover this mortgage debt of $10,000 with interest.

The petition or declaration recited the above facts and pleaded the relevant Florida statutes and the Florida decisions applying and giving them effect.

It was also expressly pleaded that the defendant was out of the State of Florida when the obligations became due, and that at all times since then he has been absent from and never resided in Florida.

Defendant demurred to the petition, on the ground "that the action has not been brought within the time limit for the commencement of such actions".

Action by the Courts Below.

The Common Pleas Court sustained the demurrer without an opinion and entered judgment for the defendant. Upon appeal to the Court of Appeals, the judgment was reversed without an opinion and the cause remanded. That Court then certified the case to the Supreme Court of Ohio for review on the ground that its judgment was in conflict with

a decision of another Court of Appeals of Ohio. The Supreme Court of Ohio—Justice Bell, dissenting—reversed the Court of Appeals and affirmed the judgment of the Court of Common Pleas in favor of the defendant.

Nature and Character of the Obligation and Agreement of Defendant Grantee.

Because of the difference in terminology used by the Courts of Ohio and those of Florida, it is important that there be a clear understanding of the exact nature and character of the cause of action and of the grantee's obligation and agreement.

Literally and factually, neither the mortgagee nor the grantee signed or sealed any instrument. As to them, the contract is not even "in writing"; indeed, there is no direct agreement between such grantee and the mortgagee.

All states agree that the liability of such grantee arises out of his acceptance of the deed, but the states divide themselves into two schools of thought with respect to the legal intendments and implications and with respect to the nature and character ascribed in law to this obligation of the grantee. The difference between them is, in the instant case, of the utmost importance, and nowhere has it been better stated than by Mr. Justice Gray in *Willard* v. *Wood*, 135 U. S. 309, 313 (1890), to this effect:

(1) Some states hold the agreement to be "*in the nature of an assumpsit or implied agreement*, arising from the acceptance of the deed *and consequently a simple contract*". (Italics supplied).

(2) Other states hold the agreement to be "*in the nature of a covenant under seal, and consequently a specialty*". (Italics supplied).

In Both Ohio and Florida Such Grantee's Obligation and Agreement Is in the Nature of a Specialty.

Thus Ohio Holds:

"The acceptance of the deed binds the grantee as effectively *as if the deed were an indenture or deed inter partes*" [*Cleveland Trust Co.* v. *Elbrecht*, 137 Ohio S. 358, 30 N. E. (2d) 433 (1940)]; "*as if he had signed and sealed the instrument*" [*Hickey* v. *Railway Co.*, 51 Ohio S. 40, 36 N. E. 672 (1894)].

Thus Florida Holds:

By its acceptance the grantee "is as effectively bound by the said deed *as though it was an indenture deed inter partes*" [*Brownson* v. *Hannah*, 93 Fla. 223, 111 So. 731 (1927); *Berns* v. *Harrison*, 100 Fla. 1105, 131 So. 654 (1931)]; "*as if he had signed and sealed it*" [*Whitfield* v. *Webb*, 100 Fla. 1619, 131 So. 786 (1930)].

The Statutes of Limitations of Ohio and Florida and the Decisions of Their Respective Courts Construing Them.

Section 4663—(1) Compiled General Laws of Florida (1927) provides:

> "Section 4663 (2939) *Limitations*—Actions * * * can only be commenced as follows:
>
> 1. Within twenty years—* * * an action upon any contract, obligation, or liability founded upon an instrument of writing under seal."

The Florida decisions construing and applying this statute hold that an action, as in the instant case, by the mortgagee against the grantee, is within the purview of this statute and is not barred for 20 years. These decisions specifically deny that such an action is within the purview of Section 4663—(2), which fixes the period of limitations at 5 years for "An action upon any contract, obligation or liability, founded upon an instrument of writing *not* under

seal" [*Brownson* v. *Hannah*, 93 Fla. 223; *Berns* v. *Harrison*, 100 Fla. 1105].

In addition, Section 4648, paragraph 4, Compiled General Laws of Florida provides:

> "*Exceptions in time of limitations.*
>
> Section 4648 (2928) Absence of defendant from the state—If when the cause of action shall accrue against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state".

The Supreme Court of Florida, construing and applying this statute, held that defendant's absence extended the general statutes of limitations, even though defendant never had been in Florida.

It also ruled that this action controlled the limitation periods provided by Section 4663, that the two had to be read together, and that the general statute could not begin to run if the defendant is at no time available in Florida for service [*Van Deren* v. *Lorey*, 87 Fla. 422, 100 So. 794 (1924)].

Section 11221, General Code of Ohio provides:

> "Section 11221. Contract in writing—An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued".

Construing and applying this statute and its predecessors, the Supreme Court of Ohio previously had held that while in its strict common law sense the term "specialty" applied only to instruments under seal, that the term "specialty", early in England and in America, had acquired a "more comprehensive sense" or a "transferred sense", and that the term "specialty", as used in these statutes of limitations, also had such "more comprehen-

sive sense" or "transferred sense" and included as well obligations of record, a judgment of a foreign justice of the peace, statutory obligations and *"any debt evidenced in solemn form"* even though they were not founded on an instrument under seal [*Stockwell* v. *Coleman*, 10 Ohio S. 33 (1859); *Fries* v. *Mack*, 33 Ohio S. 52 (1877); *Doyle* v. *West*, 60 Ohio S. 438 (1899)].

We wish to point out that these decisions are identical with what the Supreme Court of the United States said and ruled in *Koshkong* v. *Burton*, 104 U. S. 668 (1881), in construing a Wisconsin statute of limitations as to "specialties".

Specifically, the Supreme Court of Ohio, more recently but previous to the instant case, had ruled that such an action by the mortgagee against the grantee was within the purview of the above Section 11221, General Code Ohio, and was not barred for 15 years. Although it construed the obligation to be "a contract in writing" rather than "a specialty", this distinction made no difference in that case because Section 11221 applies alike to both [*Cleveland Trust Co.* v. *Elbrecht*, 137 Ohio S. 358].

Section 11234, General Code of Ohio, which is in the nature of a comity or "borrowing" statute, provides as follows:

> "BAR OF FOREIGN LAW AND OTHER MATTERS.
>
> Section 11234. Action, time for bringing. If the laws of any state or country where the cause of action arose limits the time for commencement of the action to a less number of years, than do the statutes of this state in like causes of action, then said cause of action shall be barred in this state at the expiration of said lesser number of years".

HOW OHIO SUPREME COURT ARRIVED AT ITS RULINGS AND CONCLUSIONS.

The instant action was not barred by the 15 year limitation provided by the general Ohio statute (Section 11221). It was not barred by Florida's 20 year statute pertaining to contracts under seal, which admittedly would have applied, had this suit been brought in Florida. The running of Florida's 5 year statute on simple contracts was suspended in Florida because of the defendant's absence from the State of Florida at all times. Notwithstanding, the Ohio Supreme Court held that the instant suit *was barred within 5 years* of its accrual, and sustained defendant's demurrer.

Two decisions of the Ohio Supreme Court must be read together to get its reasoning in arriving at this extraordinary and anomalous conclusion: (1) its opinion in the instant case, reported *sub nomine*, *Payne* v. *Kirchwehm*, 141 Ohio S. 384, Ohio State Bar Assn. Report, April 26, 1943, and (2) its opinion in the companion case of *Alropa* v. *Kirchwehm*, 138 Ohio S. 30. Copies of these opinions are attached as an appendix.

In these opinions, the Ohio Supreme Court concedes that under the laws of Florida the contract in question "is a contract under seal" and consequently a specialty; and it in effect concedes that if the contract is likewise a specialty under the laws of Ohio that then the demurrer should have been dismissed, since Florida's statute of limitations in actions on specialties is 20 years, or five years longer than that of Ohio (which for actions on specialties, is 15 years), for even the shorter period had not yet expired. The Court, however, reasoned as follows:

1. The Court below now ruled that under the laws of Ohio the grantee's contract was *not* a specialty—was not, in Ohio, a sealed instrument, because Ohio had abolished

seals in 1883 by Section 32, General Code of Ohio, providing that:

> "Private seals are abolished and the affixing of what has been known as a private seal to an instrument shall not give such instrument additional force or effect or change the construction thereof".

2. For this reason the Court below further ruled that the instant action in Ohio was not an action on a specialty within the meaning of that term as used in Ohio's statute of limitations (Section 11221), but was an action merely on a "contract in writing", even though the deed was not signed by either the grantee or the mortgagee.

3. Since the present cause of action arose in Florida, the court below properly ruled that it should not apply Ohio's 15 year statute of limitations (Section 11221) if the laws of the State of Florida, where the cause of action arose, barred the action within a lesser number of years, in view of Section 11234 General Code of Ohio which provides:

> "If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years".

4. But the Court below ruled that in ascertaining whether the cause of action in question was barred in Florida in less than 15 years that the Ohio Court was not required to accept the law of Florida as laid down in Florida's decisions holding that such action was on a sealed instrument (a specialty) and therefore within Florida's 20 year statute of limitations [*Brownson* v. *Hannah*, 93 Fla. 223; *Berns* v. *Harrison*, 100 Fla. 1105; and *Whitfield* v. *Webb*, 100 Fla. 1619] if the Ohio court did not consider the action in Ohio as founded on a specialty or sealed instrument.

5. And the Court below further ruled that since Ohio, by Section 32 G. C. Ohio, had abolished seals, the instant suit in Ohio was not on a specialty or sealed instrument and the Court could therefore ignore Florida's statutes, and Florida's decisions construing these statutes, as aforesaid, and could select and apply Section 4663—(2) Comp. Gen. Laws Fla., fixing the period of limitations at 5 years for action on contracts in writing *not under seal,* as the time within which *such* actions could be said to be barred in Florida. This the Court below did; and, since that period was shorter than Ohio's 15 year period of limitations, it concluded that the cause of action had already been barred in Florida, and, therefore, was no longer maintainable in Ohio.

6. In addition to applying this assumed and fictional 5 year period of limitations as being the law of Florida, the Court below ruled that it was not required to give effect to Section 4648 par. 4 Comp. Gen. Laws Fla., relating to the defendant's absence from that state totalling the general statutes of limitations, and that it was not required to give effect to Florida's decisions construing that statute, even though it had been pleaded that the defendant grantee was never within the State of Florida and that, therefore, the action against the grantee under the law of Florida was never barred in Florida even as a contract not under seal.

Therefore, ruled the Court below, plaintiff's action was barred in Ohio by the lapse of 5 years, even though that very action, if predicated on an Ohio contract, would not be barred in Ohio in less than 15 years; and even though that very action, if brought in Florida, would not there be barred in less than 20 years, and would not be barred in Florida at all, in the instant case, because defendant never was in that state or available for service of process so that the statute of limitations under the laws of Florida never started to operate.

The Construction, Application and Effect Which the Court Below Gave to Sections 32, 11221 and 11234 General Code Ohio Violated Constitutional Guarantees.

It may be that as between Ohio citizens as applied to an Ohio contract, these rulings of the Supreme Court of Ohio, however erroneous in principle, would have to stand, but it is obvious that the rulings in the instant case, even though erroneous, could have no effect on the rights of said Ohio citizens in litigation *inter se*, since the 15 year period of limitations of Section 11221 G. C. Ohio applied equally as well to a mere "contract in writing" as to a "specialty". It is therefore obvious that the instant rulings, conflicting as they do with prior rulings of the Supreme Court of Ohio itself, are directed only against non-resident plaintiffs, were so intended and are highly discriminatory against non-residents. For this reason, and because of the Ohio Court's disregard of the laws of Florida, which it assumed to apply, as well as because the contract was made and was to be performed in Florida, and because the laws of Ohio can have no extra-territorial effect, it is obvious that the decision of the Ohio Court directly challenges at least three provisions of the Federal Constitution, namely:

(1) The "Full Faith and Credit" clause-Article 4, Sec. 1.

(2) The "Due Process Clause"—XIV Amendment.

(3) The "Contract Clause"—Article I, Sec. 10.

Lower Court's Construction of the Ohio Statutes and the Application and Effect It Gave Them Transgresses the Full Faith and Credit Clause of the Federal Constitution.

Whatever the nature of the errors into which the Court below fell, they are relevant here only insofar as they led to conclusions which transgressed Federal Constitutional guarantees.

Mr. Justice Bell, in his dissent, states that the majority opinion is "in head-on collision" with the Federal Constitution; he might also have added that it is in the very teeth of the decisions of this Court.

As already stated, the Court below did not apply to the instant action, Ohio's own 15 year statute of limitations (Section 11221). Under Section 11234 the Court was required to apply a shorter period only "if the laws of" Florida barred the action in a "lesser number of years." Yet the Ohio Court, fully cognizant of the Florida 20 year statute and the Florida decisions applying it to the instant type of action, concluded that the applicable period of limitations under the laws of Florida was 5 years instead of 20 years, as the Florida decisions hold. The Ohio Supreme Court correctly found what was the law of Florida, but refused to apply it. This, therefore, is not the case of *misconstruction* of the laws of another state. It is a case of the *refusal to apply* the recognized and *admittedly correct law of another state.*

It is obvious that the law of Florida was a necessary element in the proposition before the Court below; and that in this proposition was involved the determination of not only what was the statutory law of Florida, but also what was its application under the decisions of Florida's court of last resort [*Eastern B. & L. Assn.* v. *Ebaugh,* 185 U. S. 114 (1902)]; therefore necessarily the Ohio Court had to decide what faith and credit Ohio should give to the Florida statutes and to the decisions of Florida's Supreme Court construing and giving them effect.

The existence of Federal rights thus turn on the meaning and effect of the Florida statutes [*Adam v. Saenger,* 303 U. S. 59 (1938)] since Ohio's conclusion rested "in part (or in whole) upon its construction of the" Florida statutes and Florida decisions constructing them.

But, as already stated, under the statutes of Florida the period of limitations is 20 years in actions on contracts

under seal; and, under the decisions of Florida's Supreme Court, this statute of limitations was specifically applied to an action by a mortgagee against the grantee under a deed poll reciting that the grantee assumes and agrees to pay the mortgage debt, the decisions holding that the grantee "is as effectively bound by said deed as though it was an indenture deed inter partes" [*Brownson* v. *Hannah*, 93 Fla. 223; *Berns* v. *Harrison*, 100 Fla. 1105] "as if he had signed and sealed the deed poll" [*Whitfield* v. *Webb*, 100 Fla. 1619].

Thus we have the specific decision of the Supreme Court of Florida that such action is not barred "under the laws" of Florida in less than 20 years (and specifically stating that the 5 year period does not apply). Indeed, the decisions of the Supreme Court of Florida are clear that under Section 4648—(4) any statute of limitations does not even start to run let alone bar the action, if the defendant is at no time available in Florida for service [*van Deren* v. *Lorey*, 87 Fla. 422 (1924)].

It is not our contention that Florida's tolling statute suspends the running of Ohio's general statute of limitations (Section 11221 G. C. Ohio). But since the Ohio Court applied Florida's 5 year statute of limitations, the Full Faith and Credit clause of the Constitution requires that it also give effect to Florida's tolling statute, which is *in pari materia* with and suspends the running of the general statute of Florida while defendant is absent therefrom [*Van Deren* v. *Lorey*, 87 Fla. 422 (1924)].

To apply *Florida's* 5 year statute, and then to make the *fact* of defendant's presence in or absence from *Ohio* the criterion as to whether faith and credit should be given to another section of that statute which is *in pari materia* with the first, is to place a construction upon the Full Faith and Credit clause which this Court has never placed upon it, and one which is entirely unwarranted.

It is, therefore, respectfully submitted that Ohio could not, contrary to these decisions and in the face of them, decide that the period of limitations in Florida, applicable to this action was 5 years or that defendant's absence from the State of Florida was immaterial. In so deciding, Ohio disregarded the statutory law of Florida as expounded by the highest Court of that State [*Eastern B. & L. Assn.* v. *Ebaugh, supra*], and transgressed the Full Faith and Credit clause of the Federal Constitution in that Ohio has decided against the effect which appellant sets up for the Florida statutes and decisions, given them by the law and usage in Florida [*Crapo* v. *Kelly*, 83 U. S. 610 (1872)].

In other words, Ohio has denied to the Florida statutes the validity, force and effect given them by Florida's decisions [*Atchinson Ry.* v. *Sowers*, 213 U. S. 55 (1909)].

A similar question was decided by this Court in *Burns Mtge. Co.* v. *Fried*, 292 U. S. 487 (1934), except that since that case arose in the Federal Court it was decided under Sec. 34 of the Judiciary Act instead of the Full Faith and Credit clause, which applies to state courts. However, we submit that what was there said is equally applicable here.

It may be observed that what the Full Faith and Credit clause of the Federal Constitution requires, whenever the statutes of a sister state come into play in the forum of another state, is that the latter shall give them not merely *some* but *full* faith and credit [*Davis* v. *Davis*, 305 U. S. 32 (1938)]; that is, the same effect as these laws have by law and usage at home [*Chicago and Alton R. R.* v. *Wiggins*, 119 U. S. 615 (1886); *Milwaukee County* v. *White*, 296 U. S. 268 (1935)]; such effect as is given to such statutes of the sister state by the decisions of that state in construing and applying them [*John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178 (1936); *Modern Woodmen* v. *Mixer*, 267 U. S. 544 (1925); *Eastern B. & L. Assn.* v. *Ebaugh, supra; Milwaukee County* v. *White, supra*].

Lower Court's Construction of the Ohio Statutes and the Application and Effect It Gave Them Transgresses the Due Process Clause of the Fourteenth Amendment.

By the same token, the construction, application and effect which the Court below gave to Sections 32, 11221 and 11234 General Code of Ohio, violated the Due Process clause of the Fourteenth Amendment.

This Court has held in *Home Insurance Co.* v. *Dick*, 281 U. S. 397 (1930), that the statute of a forum is properly challenged as violating this clause, and that such statute, as construed and applied by the forum, is unconstitutional, if it is applied to a contract made and to be performed in a sister state, the laws of which are different from those of the forum. A state may not by its own laws "determine the choice of law to be applied in the other" states [*Pacific Ins. Co.* v. *Industrial Acc. Comm.*, 306 U. S. 493 (1939)].

The undue extension of the statutes and authority of a state beyond its own borders by the expedient of rendering a judgment against non-residents over whose person or property the state has acquired jurisdiction may infringe "due process of law" [*Pink* v. *A. A. A. Highway Express*, 314 U. S. 201 (1941); *Home Insurance Co.* v. *Dick, supra*].

The law of a forum cannot constitutionally be applied to or against extrastate contracts, since a state cannot regulate business outside of its limits and control contracts made by citizens of other states [*Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389 (1924)].

Lower Court's Construction of the Ohio Statutes and the Application and Effect It Gave Them Transgresses the Contract Clause of the Federal Constitution.

By the same token and in the same way, the construction, application and effect which the Court below gave to Sections 32, 11221 and 11234 General Code Ohio, violated the

Contract clause of the Federal Constitution. Remedies are within the protection of this clause [*Butz* v. *Muscatine*, 8 Wall. 575; *Gunn* v. *Barry*, 15 Wall. 610; *Edwards* v. *Kearzey*, 96 U. S. 595 (1877)].

The judicial construction of a statute becomes, in so far as contract rights acquired under it, as much a part of the statute as the text itself; the same in its effect on contracts as an amendment of the law by means of a legislative enactment [*Douglass* v. *Pike County*, 101 U. S. 677; *Louisiana* v. *Pillsbury*, 105 U. S. 278].

If the changed law, altering the remedy, impairs substantial rights it violates the contract clause [*Van Hoffman* v. *Quincy*, 4 Wall. 535].

The prohibition of the contract clause extends to all acts of the state whether through its executive, its legislative or judicial authorities [*Scott* v. *McNeal*, 154 U. S. 34 (1893); *Missouri* v. *Dockery*, 191 U. S. 165].

With respect to the Contract clause, this Court, in *Home Insurance Co.* v. *Dick*, *supra*, indicated there was merit in the contention that this clause was violated when statutes of the forum, as it construed and gave them effect, were by the decision made to operate on a contract of a sister state, which when entered into was not subject to the laws of the forum even though the statute involved ante-dated the contract. This Court there held the question to be within its obligatory appellate jurisdiction, but held that it was unnecessary to decide the question, since the Court held the decision of the forum to have violated the Due Process clause.

RULINGS OF THE SUPREME COURT OF OHIO WERE SUCH AS TO BRING THE CASE WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON.

It is respectfully submitted that the aforesaid rulings of the Supreme Court of Ohio were such as to bring the

instant case within the jurisdictional provisions of 28 U. S. C. Sec. 344 a, in that they stand for the validity of Sections 32, 11221 and 11234, General Code Ohio, as construed, applied and given effect by the Ohio Supreme Court; and these statutes, as so construed, applied and given effect, draw into grave and serious question the aforesaid provisions of the Federal Constitution.

Singly and collectively they led to the extraordinary and anomalous conclusion of the Supreme Court of Ohio that the action by the plaintiff mortgagee was barred in Ohio within 5 years, although the identical action under the identical facts, if predicated on an Ohio contract, was not there barred in less than 15 years; and although concededly, if plaintiff could have secured service on defendant in Florida, plaintiff's action would not have been there barred in less than 20 years; and although in the instant case the action was never barred in Florida at all because of defendant's continuous absence from that State.

CASES RELIED ON TO SUSTAIN THE JURISDICTION OF THIS COURT.

Adams v. *Sanger*, 303 U. S. 59, 58 S. Ct. 454 (1938);

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 45 S. Ct. 129 (1924);

Atchinson Ry. v. *Sowers*, 213 U. S. 55, 29 S. Ct. 397 (1909);

Chicago & A. Ry. Co. v. *Wiggins*, 119 U. S. 615, 7 S. Ct. 398 (1886);

Crapo v. *Kelly*, 83 U. S. 610 (1872);

Crowell v. *Randall*, 10 Peters 368;

Davis v. *Davis*, 305 U. S. 32, 59 S. Ct. 3 (1938);

Eastern B. & L. Assn. v. *Ebaugh*, 185 U. S. 114, 22 S. Ct. 566 (1902);

Erie Ry. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938);

Hanley v. *Donoghue*, 226 U. S. 551, 33 S. Ct. 129 (1902);

Home Ins. Co. v. *Dick*, 281 U. S. 397, 50 S. Ct. 338 (1930);
Honeymoon v. *Hannon*, 302 U. S. 375, 58 S. Ct. 273 (1937);
John Hancock Ins. Co. v. *Yates*, 299 U. S. 178, 57 S. Ct. 20 (1936);
Miller v. *Schoene*, 276 U. S. 272, 48 S. Ct. 246 (1928);
Millsapa College v. *City of Jackson*, 275 U. S. 129, 48 S. Ct. 94 (1927);
Milwaukee County v. *White*, 296 U. S. 268, 56 S. Ct. 275 (1935);
Modern Woodmen v. *Mixer*, 267 U. S. 544, 45 S. Ct. 389 (1925);
Murray v. *Charleston*, 96 U. S. 432;
Saltonstall v. *Saltonstall*, 276 U. S. 260, 48 S. Ct. 225 (1928);
Schuylkill Trust Co. v. *Penna.*, 296 U. S. 113, 50 S. Ct. 31 (1935);
Senn v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857 (1937);
Supreme Council of Royal Arcanum v. *Green*, 237 U. S. 531, 35 S. Ct. 724 (1914);
Terre Haute Ry. Co. v. *Indiana*, 194 U. S. 579, 24 S. Ct. 767 (1904);
West v. *A. T. & T.*, 311 U. S. 223, 61 S. Ct. 179 (1940).

CONSTITUTIONAL QUESTIONS HERE INVOLVED ARE SUBSTANTIAL.

The Federal questions here involved are not only substantial but of grave and serious national import. The brilliant dissenting opinion of Mr. Justice Bell, specifically grounded on repugnancy to the Federal Constitution, is proof positive of that fact. Perhaps even more significant, is the fact that the Court of Appeals of Ohio, by its judgment, disregarded the decision of the Supreme Court of Ohio

rendered in the earlier case [*Alropa* v. *Kirchwehm*, 138 Ohio S. 30 (1941)]. We are confident that each of the Ohio statutes, as applied and enforced in respect to the contract and the situation presented and tested by their operation and effect, transgresses the Federal Constitution in the particulars previously indicated. This, however, is not the time to discuss these questions, since the present inquiry merely is whether the questions are substantial in the sense that term is used for jurisdictional purposes.

This Court has frequently decided that the questions here involved are inherently Federal questions of substance with respect to this Court's obligatory appellate jurisdiction.

Thus this Court has decided that there is presented a Federal question "of substance" giving this Court jurisdiction by appeal where a state statute is challenged:

(1) under the Due Process clause [*Miller* v. *Schoene*, 276 U. S. 272 (1928); *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (1928); *Senn* v. *Tile Layers Union*, 301 U. S. 468 (1937)]; especially if the forum applies its laws to contracts made and to be performed in another state and the laws of the latter radically differ [*Home Insurance Co.* v. *Dick, supra*];

(2) as violating the Contract clause [*Honneymoon* v. *Hannon*, 302 U. S. 375 (1937); *Home Insurance Co.* v. *Dick, supra*; *Millsapa College* v. *City of Jackson*, 275 U. S. 129 (1927)];

(3) as transgressing the Full Faith and Credit clause [*Aetna Life Insurance Co.* v. *Dunken, supra; Supreme Council of Royal Arcanum* v. *Green*, 237 U. S. 531 (1914)].

The decisions of this Court to which we have referred indicate that this Court has given favorable consideration to our contention in connection with identical or similar situations and are themselves evidence that the Federal questions we raise are substantial.

Question Involved Is of National Import.

The Federal Questions here involved are substantial, also, because of their national import. Real estate transactions between citizens of different states yearly reach huge and staggering proportions. Unlike ordinary commercial transactions, once a real estate transaction is consummated, the parties rarely have personal contact thereafter. It is, therefore, of the utmost importance that there shall be as little confusion as possible as to what the relevant law is in the two states represented by the citizenship of the contracting parties. If the law of the forum may, in subsequent litigation under the guise of applying the law of the state of contracting, give to that law an application and effect entirely foreign and opposite to that given by the statutes and decisions of the state of contracting, that law will have as many "divergent and conflicting effects" as there are states in the Union. "Confusion worse confounded" would have nothing on this confusion.

Possible divergence and conflict of such a character, even though such possibility was there limited to but two forums, was assigned by this Court as the reason for overruling its own decision of *Swift* v. *Tyson*, [*West* v. *American Tel. & Tel.*, 311 U. S. 223 (1940); *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64 (1938)]. The confusion was there eliminated by this Court ruling that the "rules of decisions established by judicial decisions of state courts are 'laws' as well as those prescribed by statute" [*West* v. *American Tel. & Tel. Co. supra*]. There the authority of this Court for so interfering and determining was Section 34 of the Judiciary Act of 1789, c. 20, 28 U. S. C. A. 725, which made the state laws rules of decision in trials in the Federal courts sitting in that state; here the confusion may be eliminated because it results from Ohio's violation of the Constitutional provisions discussed.

The case, we submit, involves the sovereign rights of the State of Florida. Ohio was not obliged by its legislation to adopt the laws of Florida; but when it did, by its legislative enactment, Florida and its citizens have the constitutional right to demand that Ohio give to Florida's laws so adopted, full faith and credit; not *some*, but *full* faith and credit—the same application and effect as is given to the Florida laws by the decisions of the Florida Supreme Court.

STAGE OF PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

In view of the prior decision by the Ohio Supreme Court in *Alropa* v. *Kirchwehm, supra,* in order to raise the Federal questions at the earliest possible moment, the plaintiff pleaded in the petition, in paragraphs 15, 16 & 17 [Record pp. 8 & 9] that the Ohio statute, as interpreted in said decision, contravened the Federal Constitution in the following particulars:

> "(a) It is a denial of due process of law contrary to the 14th Amendment * * *."
>
> "(b) It is an impairment of the obligation of contract contrary to Article I, Sec. 10 * * *."
>
> "(c) It is a denial of full faith and credit to the laws of a sister State contrary to Article 4, Sec. 1 * * *."

The same Federal questions were specifically raised by plaintiff in the assignments of error filed by plaintiff in the Ohio Court of Appeals, pursuant to the appeal by plaintiff from the judgment of the Court of Common Pleas [Record, pp. 18, 19 & 20].

The plaintiff had no further opportunity to raise the Federal question in any pleading since the decision of the Court of Appeals was in plaintiff's favor, but all the constitu-

tional questions specified in the assignments of error were sharply presented and pressed in the Supreme Court of Ohio and at every other prior stage of the proceedings. None of the Federal questions are discussed, referred to or specifically passed upon in the majority opinion of the Supreme Court of Ohio, but were obviously decided by that Court. Similarly, that opinion obviously intended to overrule them, since by implication the Court overruled appellant's contention that the Ohio statutes referred to, as construed and applied by the majority opinion, are repugnant to the Constitution of the United States. [*Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113 (1935).]

The Supreme Court of Ohio could not have reached its decision except by erroneously construing and applying the Ohio laws in violation of the Federal Constitution. The Federal questions must therefore be deemed to have been passed upon by the Supreme Court of Ohio, even if its opinion does not refer to them [*Terre Haute Ry. Co.* v. *Indiana*, 194 U. S. 579 (1904); *Crowell* v. *Randall*, 10 Pet. 368; *Murray* v. *Charleston*, 96 U. S. 432]. On the other hand the dissenting opinion of Mr. Justice Bell does go into the constitutional question presented and specifically states that the decision of the majority is "in head-on collision with at least two provisions of the Constitution of the United States."

It is therefore respectfully submitted that the Federal questions were properly and timely presented in the courts below.

Appellant in proper time also filed as of right in the Court below, an application for rehearing in which the Federal questions covered by the assignments of error were again pressed and argued, but the application for rehearing was denied without opinion.

In conclusion, we respectfully submit that the Federal questions here presented are substantial and that they are

within the obligatory appellate jurisdiction of this Court. If, however, any of the questions can be said to come within the optional jurisdiction of this Court by certiorari, we respectfully request that to this extent the Court consider our Petition for Appeal also as a Petition for Certiorari, as it may do under 28 U. S. C., Section 344 (c).

Respectfully submitted,

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WM. K. GARDNER,
Attorneys for plaintiff-appellant.

APPENDIX.

EXHIBIT "A".

PAYNE v. KIRCHWEHM.

Opinion—Supreme Court of Ohio.

Statement of the Case.

PAYNE, APPELLEE, *v.* KIRCHWEHM, APPELLANT.

Limitation of actions—Contract in writing—Florida five-year, and not Ohio fifteen-year, limitation applies, when—Sections 11221 and 11234, General Code—Limitation not tolled by person being absent from Florida, when.

1. Though, under the provisions of Section 11221, General Code, fifteen years is the limitation of time fixed for an action upon a contract in writing in Ohio, the five-year limitation prescribed by the law of Florida for an action upon a contract in writing is by reason of Section 11234, General Code, applicable to an action brought in Ohio upon a written contract executed and to be performed in Florida. (Paragraph 4 of the syllabus in the case of *Alropa Corp.* v. *Kirchwehm*, 138 Ohio St., 30, approved and followed.)
2. The fact that a person is absent from Florida when such a cause of action accrues against him, does not likewise toll the statute of limitation in Ohio when such person is in Ohio and subject to an action in that forum.

(No. 29276—Decided April 21, 1943.)

CERTIFIED by the Court of Appeals of Cuyahoga county.

This action was instituted in the Court of Common Pleas of Cuyahoga county to obtain a judgment on two promissory notes.

According to the amended petition the principal of each note is $5,000 with interest at the rate of eight per cent per annum. Each was executed under seal December 24, 1924, in the state of Florida and is payable there. One matured

in two years and the other in three. Each was given as a part of the consideration for the purchase of forty acres of Florida land now encumbered by five mortgages aggregating the sum of $75,000. The third in this series of mortgages was executed as security for the payment of the two notes here involved, but foreclosure is not asked.

Counsel for Parties.

Neither the plaintiff Payne nor the defendant Kirchwehm was a party to the original transaction. The property was sold and transferred several times before it was purchased by the defendant who, by the acceptance of a warranty deed under seal, expressly assumed and agreed to pay, as a part of the consideration, the four mortgages then on the property. The fifth mortgage was executed by the defendant himself. Like the property, the two notes were sold several times. The plaintiff purchased them June 30, 1939—twelve and one-half years after the first matured, and eleven and one-half years after the second became due. It is alleged that no payment ever was made on either note. This action was instituted October 16, 1941—nearly fifteen years after the first note became due, and fourteen years after the second matured.

To the plaintiff's amended petition the defendant filed a demurrer on the ground that the suit was not "brought within the time limit for the commencement of such actions." The trial court sustained the demurrer and entered judgment for the defendant.

Upon an appeal to the Court of Appeals on questions of law the judgment was reversed and the cause remanded. One member of the court dissented. That court then certified the case to this court for review and final determination on the ground that the judgment is in conflict with that pronounced upon the same question by the Court of Appeals of the Sixth Appellate District in the case of *Bowers* v. *Holabird, Exrx.*, 51 Ohio App., 413, 1 N. E. (2d), 326.

Mr. W. K. Gardner and *Mr. Sigmund H. Steinberg,* for appellee.

Messrs. Miller & Hornbeck, Mr. Joseph M. Murphy and *Messrs. Cole & Hodge,* for appellant.

WEYGANDT, C. J. The question confronting the court in this case is whether the principles announced in the similar case of *Alropa Corp.* v. *Kirchwehm,* 138 Ohio St., 30, 33 N. E. (2d), 655, apply. The defendant contends that they do, while the plaintiff insists that the two cases are distinguishable on the facts.

In the syllabus in the *Alropa case* this court unanimously spoke as follows:

"1. The validity and interpretation of a contract are governed by the laws of the state where such contract is made or is to be performed; but the remedies are governed by the laws of the state where the suit is brought. The limitation of actions relates to the remedy.

"2. In Ohio, seals having been abolished, a stipulation incorporated in a deed whereby a grantee agrees to assume and pay a mortgage on the real estate involved is a contract in writing. (*Cleveland Trust Co.* v. *Elbrecht, Trustee,* 137 Ohio St., 358, approved and followed.)

"3. Under the provisions of Section 11234, General Code, the period of limitations of the state where the cause of action arose is applicable in an action brought thereon in Ohio if the limitation period in like causes of action under the law of such state is less than under the Ohio statute.

"4. Though, under the provisions of Section 11221, General Code, fifteen years is the limitation of time fixed for an action upon a contract in writing in Ohio, the five-year limitation prescribed by the law of the state of Florida for an action upon a contract in writing, by reason of Section 11234, General Code, is applicable in an action brought in Ohio upon a written contract executed and to be performed in Florida."

In his amended petition the plaintiff alleges that at the time his cause of action accrued against the defendant the latter was out of the state of Florida and has been absent therefrom ever since. The plaintiff insists that the single

fact of the defendant's continuous absence from the state of Florida clearly distinguishes this case from the *Alropa case* and brings into operation the following provision of Section 4648 (4) of the Compiled General Laws of Florida:

"If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the State; * * *."

Specifically, the plaintiff contends that the effect of this provision is to toll the statutes of limitation in *Ohio* as well as in Florida so long as the defendant is absent from *Florida*. In the *Alropa case* this court held the shorter, five-year Florida limitation applicable to that action similarly instituted in Ohio but dissimilarly silent as to whether the defendant had been absent from Florida. Of what effect, then, is this additional fact in the instant case?

It is the plaintiff's theory that if Florida's shorter, five-year limitation is to be given effect here, her tolling statute must by implication be accorded equal recognition here. In other words, the plaintiff contends that the *absence* of the defendant from *Florida* tolls the statute of limitation in both Florida and *Ohio* irrespective of the defendant's *presence* in Ohio where he has been served with summons. However, a study of the previously quoted statutes of the two states discloses no implied legislative intention to give procedural effect to a so-called "absence" provision in a state in which a defendant is in fact present. It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida.

This court is of the opinion that the single factual difference does not distinguish this from the *Alropa case, supra.*

The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas is affirmed.

Judgment reversed.

MATTHIAS, HART, ZIMMERMAN, WILLIAMS and TURNER, JJ., concur.

BELL, J., dissenting. Because of the importance of the pronouncement in this case I am constrained to set forth as briefly as possible the reasons for my dissent.

The decision in the instant case is bottomed upon the conclusion reached in the case of the *Alropa Corp.* v. *Kirchwehm*, 138 Ohio St., 30, 33 N. E. (2d), 655.

The facts in the instant case are set forth in the majority opinion.

The case was decided upon demurrer to the amended petition. The single question is, "Was this action commenced within the time limited by law?"

There is little or no diversity of opinion upon the proposition that the law of the place where a contract is made and to be performed governs in construction and effect (*lex contractus*) and the law of the forum is to be applied in matters as to the remedy (*lex fori*). The limitation as to the time for the commencement of the action is a matter of remedy.

The majority decision recognizes that the law of Florida governs the construction and effect of these instruments, and that by virtue of the decisions of the Supreme Court of Florida they are contracts under seal in that state. *Brownson* v. *Hannah*, 93 Fla., 223, 111 So., 731, 51 A. L. R., 976; *Berns* v. *Harrison*, 100 Fla., 1105, 131 So., 654.

It is further recognized that the statute of limitation of Florida for a contract under seal is 20 years.

There is no statute in Ohio specifically providing a limitation for the commencement of actions on contracts under seal, by that name.

Section 11221, General Code, provides:

"An action upon a *specialty* or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued." (Italics mine.)

The first question to be considered, therefore, is whether a Florida contract under seal is a *specialty* when sued on in Ohio. The majority answer this question in the negative.

It is said by Matthias, J., in the *Alropa case,* at page 33:

"While an instrument bearing a private seal is a specialty, so are foreign judgments and public bonds, and this section does not in any way conflict with Section 32, General Code, which has abolished private seals. Section 11221, General Code, is modified by the enactment of Section 32, General Code, to the extent that the word 'specialty' in Ohio no longer includes instruments bearing private seals."

If this be the correct construction of Section 32, General Code, then in my view the section is unconstitutional.

Let us for a moment consider the provisions of these two sections of the General Code.

Section 11221 was originally passed by the General Assembly February 25, 1824 (22 Ohio Laws, 325). In substantially its present form it was passed as part of the Code of Civil Procedure (51 Ohio Laws, 57) which became effective July 1, 1853.

That portion of Section 32, General Code, abolishing private seals was passed on March 29, 1883 (80 Ohio Laws, 79), almost 30 years after the enactment of Section 11221 in substantially its present form. The last sentence of Section 32, General Code, reads as follows:

"Private seals are abolished, and the affixing of what has been known as a private seal to an instrument shall not give such instrument additional force or effect, or change the construction thereof."

There is nothing in this language disclosing any legislative intent to in any manner modify Section 11221, General Code, and I believe the correct construction of this sentence is that private seals are abolished in connection with written instruments executed in Ohio. No language is used which indicates that the General Assembly intended to deny recognition in this state to instruments under seal executed in foreign states wherein private seals were and are required in the execution of certain written instruments.

If the instruments upon which this action was based were *specialties* under our statute, there can be no escape from the conclusion that the action was commenced within

the limitation provided in Section 11221, General Code. That brings us to the inquiry, "What is a specialty?"

Webster's International Dictionary, second edition unabridged, defines the word as follows:

"Specialty. A contract or obligation under seal."

Webster's International Dictionary of the English language defines it as follows:

"Specialty. A contract or obligation under seal; a contract by deed; a writing under seal given as security for a debt particularly specified."

Ballentine's Law Dictionary reads:

"Specialty. It is an instrument under seal whereby the obligor binds himself to pay a certain sum of money to the obligee on a day appointed."

In addition to these definitions the decisions which define this word are numerous.

In *Brainerd* v. *Stewart,* 33 Vt., 402, page 404, it is said:

"Indeed we apprehend it is universally understood that by the word specialty is meant a sealed instrument, and in that sense undoubtedly it was used in the section under consideration."

In *Elsasser* v. *Haines,* 52 N. J. Law, 10, 18 A., 1095, the Supreme Court of New Jersey used this language:

" 'Specialty,' a word which, in its technical signification, imports an instrument under seal for the payment of money. The term 'specialty,' it is true, is sometimes employed in a loose way of being invested with a more extensive meaning; but when precision is important the term is used with the limited force just assigned to it." Many others might be collected.

The instruments upon which suit was brought certainly fit the definition of the word *specialty* as used and understood in the law.

Does Section 32, General Code, modify Section 11221, General Code?

It is a rule of statutory construction that modification of a statute by implication is not favored and will not be indulged unless necessary to give effect to a clear legislative intent.

I can find no language in Section 32, General Code, indicating a clear legislative intent to modify Section 11221, General Code. Had the General Assembly so intended it could have omitted this word *specialty* or used some language to indicate that such word was there used in some limited sense. The General Assembly having passed what is now Section 32, General Code, many years after the passage of what is now Section 11221, General Code, must be presumed to have known the commonly accepted meaning of the word *specialty* as used in the previously enacted statute. Unless the word *specialty* as used in Section 11221, General Code, means a contract under seal from a foreign state, then it is mere surplusage and meaningless.

It is my opinion that the instruments sued on are *specialties* under Section 11221, General Code, that the fifteen-year limitation provided therein applies and that the action was commenced within time.

Let us assume for the sake of argument, however, that this reasoning is fallacious and the conclusion is unsound. How then stands the case?

If these instruments had been executed and were to be performed in Ohio it would make no material difference whether the conclusion be reached that the suit is based upon *specialties* or upon *contracts in writing*. Under either of those circumstances Section 11221, General Code, would apply and the action could be maintained.

These instruments, however, were executed and were to be performed in Florida and if they are correctly construed as simple contracts in writing in Ohio then it is necessary to consider the application, if any, of Section 11234, General Code, which reads as follows:

"If the laws of any state or country *where the cause of action arose* limits the time for commencement of the action to a less number of years than do the statutes of this state in *like causes of action* then said cause of action shall be barred in this state at the expiration of said lesser number of years." (Italics mine.)

This section is what is known as a borrowing statute. By its terms the statute of limitation of the state where the cause of action arose is borrowed by and applies in Ohio if the action is barred in such foreign state in a lesser number of years than in Ohio. I can not find one case which holds that a borrowed statute will be applied unless such statute would be a bar if the action was commenced in the state enacting the statute.

The majority conclude that this statute has application to the situation presented and (after changing, by construction, these contracts from Florida contracts under seal to simple contracts in writing) apply Section 4663 of the Compiled General Laws of Florida which provides a five-year limitation on simple contracts in writing, and decide that this action is barred under the provisions of that statute, by virtue of the borrowing provision of Section 11234, General Code.

The purpose of Section 11234, General Code, is to apply in Ohio the same rule of limitation as would be applied if the action had been commenced in the state in which the cause of action originated, thereby preventing the maintaining of a suit in this state upon a claim which is barred by the state where the cause of action originated.

Section 11234, General Code, in my judgment has no application to this case for two very potent reasons.

First. Section 11234, General Code, applies only where there are *like causes of action.*

There can be no foundation for even a suggestion that this action would have been barred in Florida if the action could have been commenced and defendant served within that state, it being conceded that plaintiff had twenty years after breach to bring his action there.

The form of action is procedural but this procedural question turns upon a question of substance as to the quality of the instruments (contracts under seal) and the quality of the instruments is to be determined by the law of Florida. See *Burns Mortgage Co.* v. *Fried,* 292 U. S., 487, 78 L. Ed., 1380, 54 S. Ct., 813; *Irving National Bank* v. *Law,* 10 F. (2d), 721; *McElroy* v. *Gates,* 64 Wash., 249, 116 P., 845; *Hanna* v. *Stedman,* 230 N. Y., 326, 130 N. E., 566; *Klotz* v. *Angle et al., Exrs.,* 220 N. Y., 347, 116 N. E., 24.

The action in Florida would have been one upon instruments under seal and there is no *like cause of action* in Ohio unless these instruments be held to be *specialties.*

The phrase *like cause of action* as used in the statute should be construed to mean that plaintiff could maintain the identical action in either Ohio or the foreign state.

No one would seriously contend that a cause of action on a simple contract in Ohio is identical with a cause of action upon an instrument under seal in Florida.

The burden of proof is not the same in the one as the other, nor the time of commencement, and therefore they are not *like causes of action.*

Second. Section 11234, General Code, applies only where the law of the state *where the cause of action arose* has a lesser limit of time than Ohio.

The majority hold that the cause of action accrued in Florida at the time of the breach.

This brings us to the single factual difference between this case and the *Alropa case.*

The amended petition in the instant case alleges, and the demurrer admits, that "at the time the cause of action, upon which this suit is based, accrued against him, to wit, on or about November 5, 1927, the defendant, J. A. Kirchwehm, was out of the state of Florida, has been absent from the state of Florida at all times since then, and never resided in the state of Florida."

Section 4648, paragraph 4, Compiled General Laws of Florida, reads in part as follows:

"Absence of defendant from the state.—If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state * * *."

We have then for consideration this situation. A resident of Ohio goes to Florida, enters into certain contracts under seal, leaves Florida before breach and remains out of that state thereafter and when sued in Ohio upon his breached contracts attempts to avoid liability by setting up the statute of limitation not of the state of his residence, but the five-year statute of limitation of Florida which would have

no application if sued there. In other words he seeks to take advantage of his own wrong.

Where did this cause of action accrue?

11 American Jurisprudence, 513, Section 197, Conflict of Laws, reads in part:

"• • • From practical considerations, it has been held that a cause of action does not arise at a place where, because of defendant's absence, no right could be enforced, and hence that a statute admitting the bar of the place where the action arose applies the bar of defendant's residence." See *Bruner* v. *Martin*, 76 Kan., 862, 93 P., 165, 123 Am. St. Rep., 172; *Lewis* v. *Hymans*, 26 Nev., 68, 63 P., 126, 99 Am. St. Rep., 677.

The weight of authority would seem to hold that a cause of action accrues only where a right of action can be enforced. See *Timmonds* v. *Messner*, 109 Kan., 518, 200 P., 270; *Drake* v. *Bigelow*, 93 Minn., 112, 100 N. W., 664; *Kamper* v. *Hunter Land Co.*, 146 Minn., 337, 178 N. W., 747; *Lewis* v. *Hymans, supra*, and many other cases collected in 75 A. L. R., beginning at page 203.

In *Bruner* v. *Martin, supra*, at page 868, it is said:

"In a case where the note is not paid when it matures, and the payee is alive, or, if dead, there is a personal representative, a cause of action arises out of the failure of the payor to perform the obligation. The place where it arises is the place where some court has jurisdiction of the subject matter and the party against whom the cause of action has arisen. The cases referred to, holding that the cause of action arises where the contract was entered into, ignore the true definition of a cause of action and confuse it with the subject of action."

In 25 Cyc., 1067, it is said:

"The true test therefore to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result."

To the same effect see *Freundt* v. *Hahn*, 24 Wash., 8, 63 P., 1107, 85 Am. St. Rep., 939; *Osgood* v. *Artt*, 10 F., 365.

In *Drake* v. *Bigelow*, 93 Minn., page 112, the court at page 114 uses this language:

"In *Luce* v. *Clarke*, 49 Minn., 356, 51 N. W., 1162, in discussing the provision of Section 5146 [which statute relates to limitations of actions], the court called attention to the fact that all statutes of limitation, in prescribing the periods, have reference for the beginning of such period to the time when the opportunity to commence such action arises, and that the concurrence of two things is necessary to make the opportunity to commence an action, to wit, the existence of the facts constituting a cause of action suable in the courts of that state, and the presence in it of the defendant in such cause of action."

Statutes of limitation are akin to statutes providing for penalties and should be most strictly construed. However, by the conclusion of the majority, the defendant below, who was never a resident of Florida, is given the benefit of a Florida statute of limitation which concededly would have no application if the action had been prosecuted in Florida.

It was not the purpose or intent of the General Assembly to make Section 11234, General Code, the vehicle for borrowing a statute of limitation of another state to bar an action in Ohio unless such borrowed statute would also bar the action if prosecuted in that state.

In the instant case the cause of action never accrued in the state of Florida but did accrue in the state of Ohio upon default of payment of the notes; neither Section 11234, General Code, nor the statute of limitation of Florida has application to this case.

Whether these instruments are *specialties* or simple contracts in writing, Section 11221, General Code, applies, the action is not barred and the Court of Appeals was correct in so holding.

I have examined all of the cases cited in the opinion in the *Alropa case, supra*, and in my judgment neither singly nor collectively do they warrant the conclusion therein reached.

The decision in the *Alropa case, supra*, and the conclusion here reached by the majority, fails to grant full faith and credit to the public acts, records and judicial proceedings of foreign states insofar as concerns instruments under

seal, and its seems to me that both decisions are in head-on collision with at least two provisions of the Constitution of the United States.

EXHIBIT "B".

Opinion—Supreme Court of Ohio in Prior Companion Case.

ALROPA CORP., *Appellant*,

v.

KIRCHWEHM, *Appellee*.

138 Ohio S. 30, 33 N. E. (2d) 655, (1941).

Contracts—Lex loci contractus governs validity and interpretation—Lex fori governs remedies and limitations—Assumption of real estate mortgage by grantee, a contract in writing—Limitation of actions—Lesser period of foreign statute applies to Ohio action, when—Section 11234, General Code—Florida five-year, and not Ohio 15-year, limitation applies, when—Section 11221, General Code.

1. The validity and interpretation of a contract are governed by the laws of the state where such contract is made and is to be performed; but the remedies are governed by the laws of the state where the suit is brought. The limitation of actions relates to the remedy.

2. In Ohio, seals having been abolished, a stipulation incorporated in a deed whereby a grantee agrees to assume and pay a mortgage on the real estate involved in a contract in writing. (*Cleveland Trust Co.* v. *Elbrecht, Trustee*, 137 Ohio St., 358 approved and followed.)

3. Under the provisions of Section 11234, General Code, the period of limitations of the state where the cause of action arose is applicable in an action brought thereon in Ohio if the limitation period in like causes of action under the law of such state is less than under the Ohio statute.

4. Though, under the provisions of Section 11221, General Code, 15 years is the limitation of time fixed for an action upon a contract in writing in Ohio, the five-year limitation prescribed by the law of the state of Florida for an action upon a contract in writing, by reason of Section 11234, General Code, is applicable in an action brought in Ohio upon a written contract executed and to be performed in Florida.

(No. 28222—Decided February 26, 1941.)

Appeal from the Court of Appeals of Clark County.

This action was instituted in the Court of Common Pleas of Clark county. It is based upon a claim of indebtedness of the defendant resulting from his agreement as a grantee of certain real estate to assume and pay the mortgage then on the property conveyed, which agreement was contained in an instrument of conveyance under seal.

The premises are located in Florida, and the transaction involved herein was consummated in that state. The proceeds upon the sale of the property in foreclosure were insufficient to discharge the mortgage indebtedness, and this suit was brought by the assignees of such claim to recover the unpaid portion of such mortgage indebtedness, there having been no personal service on defendant in the foreclosure suit, and hence no personal judgment.

This action was brought more than seven years subsequent to the accrual of the cause of action, and the statute of limitations to be applied is the real issue presented. The Common Pleas Court applied the 20-year limitation provided by the statute of the state of Florida for instruments under seal and awarded judgment accordingly. The Court of Appeals, with one judge dissenting, held that the transaction comes within the Florida statute providing a limitation of five years for actions on simple contracts and reversed the judgment of the Court of Common Pleas. The case is in this court upon the allowance of a motion for certification.

Messrs. Blanc & Steinberg and Messrs. Keifer & Keifer, for appellant.

Messrs. Cole & Hodge, for appellee.

MATTHIAS, J.:

The issue made clearly presents the question as to whether the statute of limitations of 20 years, as provided by the statute of the state of Florida relating to actions upon contracts under seal, or its statute applicable to actions on simple contracts, which is limited to five years, is to be applied in this proceeding.

The provisions of Section 11234, General Code of Ohio, become pertinent. That section is as follows:

"If the laws of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years."

It is contended that under the law of the state where the cause of action arose the limitation upon such cause of action is 20 years. This contention is based upon the decision of the Supreme Court of Florida in the case of *Brownson* v. *Hannah*, 93 Fla., 223, 111 So., 731, 51 A. L. R., 976. In that case it was held that a grantee who assumes the payment of a specified mortgage debt upon the land conveyed is bound by the deed as though it was an indenture deed between the parties. It was further held specifically in that case that the five-year statute of limitations was not applicable in a suit based upon liability for a mortgage debt evidenced by the acceptance of a deed poll knowing that it contained a clause wherein the grantee assumed a specified mortgage debt.

The contention of the appellee is that the character of the instrument must be determined under the law of this state and that, seals having been abolished, the transaction in question is but a simple contract. It is contended, therefore, that the statute of limitations of the state of Florida relative to suits on simple contracts must be applied. If that contention be valid, it would follow that the action cannot be maintained for the reason that it was not instituted until after the expiration of five years from the time it accrued.

The specific question presented, therefore, is whether we look to the law of this state to ascertain and determine the character of the obligation and then apply the statute of limitations of the state where the contract was made and to be performed, or whether our statute has in effect adopted the statute of limitations of the state where the contract was entered into—in other words, whether we apply the rule that if, by the laws of the state or country where the cause of action arose, the action is barred, then it is barred in this state and, if not barred in the former state, it is not barred in this state. Does our statute warrant the conclusion that if, under the statutes of limitation of the state where the contract was made, the action is maintainable, it can likewise be maintained in this state?

It is to be noted that Section 11221, General Code, provides:

"An action upon a *specialty* or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued." (Italics ours.)

While an instrument bearing a private seal is a specialty, so are foreign judgments and public bonds, and this section does not in any way conflict with Section 32, General Code, which has abolished private seals. Section 11221, General Code, is modified by the enactment of Section 32, General Code, to the extent that the word "specialty" in Ohio no longer includes instruments bearing private seals.

Under the law of Florida, the contract of a grantee, incorporated in the deed, assuming and agreeing to pay a mortgage on real estate is a contract under seal. *Brownson* v. *Hannah, supra; Berns* v. *Harrison,* 100 Fla., 1105, 131 So., 654.

In Ohio, seals having been abolished, a stipulation incorporated in a deed whereby a grantee agrees to assume and pay a mortgage on the real estate involved is only a simple contract in writing. *Cleveland Trust Co.* v. *Elbrecht, Trustee,* 137 Ohio St., 358, 30 N. E. (2d), 433.

As previously indicated, before the proper statute of limitations can be applied, it is necessary to determine the nature of the contract, and before that can be done it is essential to ascertain whether that shall be determined in accordance with the law of the state of Florida or of Ohio.

There apparently is no division of authority upon the proposition that while the law of the place where the contract is made and to be performed governs its construction and effect, the law of the forum is to be applied in all matters respecting the remedy, including the limitation of the action. Hence, in every instance we must look to the law of the state wherein the action is instituted to ascertain whether it can be maintained. Our statute, Section 11234, General Code, directs that a defendant shall have the benefit of the statute of the state where the cause of action arose if that is a lesser number of years than the limitation of our statute "in like causes of action." The limitation of action upon a simple contract in writing in Ohio is 15 years; in Florida the limitation upon such a contract is five years. The limitation of action upon a specialty in Ohio is the same as a contract in writing, 15 years, while in Florida it is 20 years. The specific question presented, therefore, is: Is this to be regarded as a cause of action upon an instrument under seal or upon a simple contract in writing? To determine that question, do we apply the law of the place where the contract is made and is to be performed, or the law of the place of the action?

The general rule applicable is stated in 109 A. L. R., page 482, as follows:

"Since the question as to the limitation of actions is, subject to some exceptions, usually regarded as one relating to the remedy, it may be stated as a general rule, supported by a uniform line of authority, that in controversies where that question depends upon the primary question whether the instrument in question is or is not one under seal, the character of the instrument as one under seal will be determined by the law of the forum, and the limitation statute of the forum applicable to that character of instruments will be applied, although under *lex loci contractus* a different character would have to be ascribed thereto, and a limitation applied peculiar to that character of instruments."

Nowhere do we find the rule applicable stated more clearly or more authoritatively than by Mr. Justice Story in the case of *Bank of United States* v. *Donnally*, 33 U. S. (8 Pet.), 361, 8 L. Ed., 974. The action was one brought in the

state of Virginia upon a promissory note executed in Kentucky. There the contention was made that under the law of Kentucky it was an instrument under seal. The court held that so far as the statute of limitations was concerned, the character of the instrument must be determined by the laws of the state wherein the action was brought. Upon reaching the conclusion that under the law of that state the paper was not a sealed instrument, the court held that the action was barred by the statute of limitations governing simple contracts in writing. The statement of the principle by Mr. Justice Story is as follows:

"The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or, as it is compendiously expressed, by the *lex fori*. No one will pretend, that because an action of covenant will lie in Kentucky, on an unsealed contract made in that state, therefore, a like action will lie in another state, where covenant can be brought only on a contract under seal.

"It is an appropriate part of the remedy, which every state prescribes to its own tribunals, in the same manner in which it prescribes the times within which all suits must be brought. The nature, validity and interpretation of the contract may be admitted to be the same in both states; but the mode by which the remedy is to be pursued, and the time within which it is to be brought, may essentially differ. The remedy, in Virginia, must be sought within the time and in the mode, and according to the descriptive characters of the instrument, known to the laws of Virginia, and not by the description and characters of it, prescribed in another state. * * *

"If, then, it were admitted, that the promissory note now in controvery were a specialty by the laws of Kentucky, still it would not help the case, unless it were also a specialty, and recognized as such, by the laws of Virginia; for the laws of the latter must govern as to the limitation of suits in its own courts, and as to the interpretation of the meaning of the words used in its own statutes."

The requirement that the construction of the contract shall be in accordance with the law of the state where it is made and where it is to be performed cannot have application here because there is no issue as to the meaning or effect of the contract, and therefore no construction or interpretation is called for.

In the case of *Willard, Admr.*, v. *Wood Exrx.*, 4 Mackey's Reports, 538, later affirmed by the Supreme Court of the United States in 164 U. S., 502, 41 L. Ed., 531, 17 S. Ct., 176, the primary question considered was stated as follows: "Is the question whether a particular contract is a specialty or a simple contract, one which relates to the construction of it, or the essential rights created by it, or one relating merely to the remedy?"

The answer given by that court is so pertinent and concise as to be worthy of adoption. It was as follows: "At first glance the former might seem to be the rule. But after all, the obligation of a contract, either to pay money or do a specific act, is just the same, whether it be under seal or not. The only differences made by the seal are in the form of the action on it, and the limit of time within which it must be brought. But these differences relate entirely to the question of remedy. It is admitted on all hands that the law of the forum must always determine what form of action must be adopted in a given case. And since the question whether assumpsit or covenant shall be brought depends on the dignity of the contract, the determination of the latter seems involved in the former, and dependent on the same law.

"Such seems to be the rule settled by the authorities."

In the case of *Coral Gables, Inc.*, v. *Christopher*, decided by the Supreme Court of Vermont in 1937, 108 Vt., 414, 189 A., 147, the court had before it the same question. The only question for consideration was whether the note sued upon, which had been executed in Florida, was so executed as to be a contract under seal. The court held that where the remedy on such contract depends upon whether it is sealed or unsealed, the sufficiency of the seal is to be tested by the *lex fori*. In reaching that conclusion, the court stated: "Whatever pertains to the remedy is to be determined by the law of the forum alone. This is so because each state

regulates its own jurisprudence in its own way. It has its own way of enforcing rights and redressing wrongs. This in no way depends upon what the parties have agreed to, but to the policy of the law of the forum as a matter of its internal police [policy]. The statute of limitations affects the remedy only, and the question whether this action is barred thereby is to be determined by the law of this state."

The court concluded that, under the law of the state of Vermont where the action was brought, the contract involved was not a sealed instrument and therefore that Vermont's six-year statute of limitations applied and, such period having expired, action could not be maintained thereon in that state. Numerous cases are cited to support this conclusion.

The case of *Mercer's Estate,* decided by the Supreme Court of Pennsylvania in 1938, 330 Pa., 475, 199 A., 481, also involved an obligation created by the assumption of a mortgage on Florida land arising from a contract executed in Florida. The statement of facts relative to the issues made with respect to the statute of limitations involved is very meager. The court held that the grantee's assumption of the mortgage debt was a simple contract and subject to the six-year limitation period of Pennsylvania.

The case of *Burns Mortgage Co., Inc.,* v. *Hardy,* decided by the Federal District Court of New Hampshire in 1937, 19 F. Supp., 827, likewise involved an action upon a promissory note executed in Florida. It was held that the law of New Hampshire and not that of Florida should be applied to determine whether the note was a specialty and governed by the 20-year statute of limitations of that state or the six-year limitation applicable to simple contracts. The case came before the Circuit Court of Appeals and was decided in 1938, 94 F. (2d), 477. The judgment of the District Court was affirmed. In deciding the case, the court announced as the legal proposition governing its conclusion the following:

"That to the extent the validity of a seal affects the obligation of a contract it is to be tested by the *lex loci contractus;* but to the extent that it affects the remedy for the enforcement of the contract in a forum other than the one in which it was made, including the statute of limitations of

such forum, it is to be tested by the law of the forum—the *lex fori.*"

The case of *Alropa Corp.* v. *Rossee,* decided in 1936 by the Federal Circuit Court of Appeals of the Fifth Circuit, 86 F. (2d), 118, involved a suit in Georgia upon promissory notes executed in Florida. The law of the state of Georgia was applied to determine whether the instrument was such as to come within its 20-year statute of limitations covering instruments under seal, having announced that the law of the forum controlled.

The case of *Leroy* v. *Beard,* 49 U. S. 451, 12 L. Ed. 1151, involved an action brought in New York on an instrument executed in Wisconsin. The court found that, though the instrument involved conformed to the requirements of the law of Wisconsin relative to instruments under seal, it did not meet the requirements in that respect of the law of New York and held that the proper form of action must be such as is practiced on an unsealed instrument "in the state where the suit is instituted."

In the case of *Mandru* v. *Ashby,* 108 Md. 693, 71 A. 312, it was held that a sealed note, made in Ohio, though, according to the laws of Ohio is not a specialty, will be treated as a specialty in Maryland, and is subject to the limitation laws of Maryland. In announcing its conclusion, the court stated:

"While the *lex loci* controls the nature, construction and validity of the contracts, yet the remedy upon them is regulated by the law of the forum and throughout the United States it seems to be almost universally established that the defense of limitations is a matter of procedure to be controlled by the law of the place where the suit is instituted."

In Ohio we have no contracts under seal, seals having been abolished. Therefore, under the law of this state, the obligation in question is a simple contract in writing. The limitation upon such action in this state is 15 years, but in Florida the limitation of action upon a simple contract in writing is five years. When this contract came before an Ohio court, no question of its construction or interpretation was presented. The court was called upon to ascertain only the character of the cause of action and determine

the statute of limitations applicable thereto. The court could not determine that there was a cause of action upon a contract under seal for it is here only a contract in writing. Then the only question is whether the limitation of action upon a simple contract in writing is less under Florida law than here. If so, the defendant is entitled to the benefit thereof under the specific provisions of Section 11234, General Code. The limitation is less in Florida upon a simple contract in writing, being but five years; hence, by virtue of the provisions of Section 11234, General Code, the action is barred.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Weygandt, C. J.; Turner, Williams, Hart, Zimmerman and Bettman, JJ., concur.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1943

NO......

V. D. PAYNE,
Appellant

vs.

J. A. KIRCHWEHM

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

Facts, Statutory and Otherwise, Which Gave Rise to the Federal Questions

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An orderly exploration of the problem presented by respondent's motion to dismiss the appeal will be promoted by a concise statement, in the manner and form employed by this Court in *Adams v. Saenger*, 303 U. S. 59, respecting the federal questions which the appeal presents for the decision of this Court, and how they arose and developed in the Court below.

Plaintiff, a resident of Florida, brought this suit in Ohio, against a grantee of Florida real estate, to recover the mortgage debt which the deed, accepted by the grantee

and recorded, recited that the grantee assumed and agreed to pay. It was brought about 14½ years (less than 15 years) after the cause of action accrued, during all of which time defendant never was within the State of Florida.

The trial court sustained a demurrer which averred "that the action has not been brought within the time limit for the commencement of such actions", and gave judgment dismissing the cause. The Court of Appeals reversed the trial court, and the Supreme Court of Ohio, by a divided court, reversed the Court of Appeals and affirmed the judgment of the trial court.

The question presented by the demurrer, ordinarily an extremely simple one, becomes of federal importance because of the statutes of the two states involved, and because of the application and effect given them, or refused, by the Court below, and because of the extraordinary conclusion which that court reached.

Under the Ohio statute of limitations (Sec. 11221 G. C. Ohio), *as applied and given effect by the Supreme Court of Ohio to this specific cause of action,* the latter is not barred for 15 years (*Cleveland Trust Co. v. Elbrecht,* 137 Ohio S. 358).

Petitioner was satisfied, indeed he requested, that the Court below apply this Ohio statute of limitations. But the forum refused to do this, insisting that it was required to apply a lesser number of years if "the laws of any state or country where the action arose [Florida] limits the time for the commencement of the action to a less number of years", since Sec. 11234 G. C. Ohio provided that, in such event, "then said cause of action shall be barred in this State at the expiration of the said less number of years".

In anticipation of such a contingency, petitioner had set forth in his complaint the Florida statute of limitations

—Secs. 4663-(1) and 4648 Comp. Gen. Laws of Fla. and had also set forth the citations and purport of the decisions of the Supreme Court of Florida giving them effect and applying them *to this specific cause of action.*

These decisions hold that *this very cause of action* is not barred for 20 years under this Sec. 4663-(1) (*Brownson v. Hannah,* 93 Fla. 223; *Berns v. Harrison,* 100 Fla. 1105); and hold further that Sec. 4663-(1) must be read together with Sec. 4648, which provides that if the defendant "is out of the state the action may be commenced within the term *herein limited after his* [defendant's] *return to the* state" (*italics supplied*); and hold further that this applies as well to a defendant who never was within the state, and that no action is barred until the period fixed by the other sections has run after defendant's return to the state (*Van Deren v. Lory,* 87 Fla. 422).

The Complaint also averred defendant's absence from Florida during the entire period.

In spite of the Florida statute and decisions aforesaid, the Court below held that the instant action had become barred by the lapse of five years because another section, (Sec. 4663-(2), Gen. Comp. Laws of Fla.), fixed that period for the commencement of certain other actions; although the Supreme Court of Florida had held, in the aforesaid decisions, that this Sec. 4663-(2) *did not apply to the very cause of action involved in the instant case.*

As has been stated, the Court below claimed and insisted that it was required to apply and that it was applying, "the laws of" Florida in reaching that conclusion. It conceded that the Florida statutes were as above set forth; it conceded that the Florida decisions applying the statutes and giving them effect were as above set forth; but it refused to give these statutes the effect which they had in Florida, by Florida law and usage, as indicated

by these Florida decisions. Furthermore, the Court below held that it was not required to give any effect at all to the aforesaid Florida Sec. 4648, providing that "the action may be commenced *within the term herein limited after his* [defendant's] *return to the state*" (*italics supplied*), or to the Florida decisions applying this statute and giving it effect. Instead, the Court below held that defendant's absence from the State of Florida was immaterial in determining the time within which the action may be commenced, or be considered barred.

So we have the remarkable and anomalous conclusion, that a cause of action when sued upon in Ohio, is barred within five years, upon a presumed and pretended obligatory application by the forum of the Florida laws, although that very same cause of action is not barred under the laws of the forum for 15 years, and although the same cause of action is not barred under the laws of Florida for 20 years (if sued upon in Florida), and although, whatever the period, the action is not barred in Florida at all, under the laws of Florida, if defendant is never within the State of Florida, and although defendant never was within that State.

ARGUMENT

Respondent's Statement Opposing Jurisdiction does not challenge a single averment in appellant's Statement of Jurisdiction as to the nature of the case; nor does it deny that the federal questions we raise fall within this Court's obligatory appellate jurisdiction; nor does it claim that the federal questions we rely on are not available here because improperly, or untimely presented in the Court below. Indeed, respondent concedes that the federal questions were there properly and timely raised.

Respondent moves to dismiss the appeal merely "for the reason that the record fails to disclose the existence of any substantial federal question raised thereby". We respectfully submit that the decisions of this Court are clear that the federal questions presented by the appeal are "substantial", and well founded.

On Motion to Dismiss an Appeal the Federal Question Presented Is "Substantial" When It Is Not Frivolous

On motion to dismiss an appeal "the issue is not whether the federal question relied on will be found upon examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous" (*Louisville and Nashville Railway Co. v. Melton*, 218 U. S. 36, 49; *Green v. Van Bushkirk*, 5 Wall. 307; *Crapo v. Kelly*, 16 Wall. 610).

A motion to dismiss an appeal can prevail only if the

claim of a federal question is "unsubstantial or frivolous" (*Andrews v. Andrews,* 188 U. S. 14); "if it plainly appear that the federal question is so unsubstantial and devoid of merit as to be frivolous" (*Deming v. Carlisle Packing Co.,* 226 U. S. 102; *Dickson v. Luck Land Co.,* 242 U. S. 371); if it is "manifestly frivolous" (*West Side Belt Railroad Co. v. Pittsburgh Construction Co.,* 219 U. S. 92); or if it is "wholly frivolous" (*Chicago R. I. Pac. Ry. Co. v. Devine,* 239 U. S. 52, 54).

It is sufficient to withstand a motion to dismiss an appeal if the claim of a federal question is not "wholly without foundation", if there "be at least color of ground for such averment" (*Hamblin v. Western Land Co.,* 147 U. S. 531); if it "is at least plausible upon its face" (*American Sugar Refining Co. v. Louisiana,* 179 U. S. 89, 91); and "unless manifestly frivolous" the motion to dismiss must be denied (*West Side Belt Railroad Co. v. Pittsburgh Construction Co., supra; American Sugar Refining Co. v. Louisiana, supra*).

"A federal question which requires analysis and exposition for its decision is not frivolous and withstands a motion to dismiss" (*Milheimer v. Moffet Terminal Improvement Dist.,* 262 U. S. 710).

In *Louisville & Nashville Ry. Co. v. Melton, supra,* this Court said (at p. 49):

> "For the purpose of the motion to dismiss the issue is not whether the federal question relied on will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject and hence cause the question to be frivolous. That this is not the case here, we think results from the following considerations:

(*a*) because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented;

(*b*) Because the division in opinion in the lower court as to whether the statute, as construed, was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy over the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below."

We respectfully submit that the latter decision alone is conclusive that the instant motion to dismiss should be denied, since the case at bar presents every factor there involved. Here, too, there was considerable conflict in the different courts below and a division in the opinion of the Court below, and Justice Bell, in his dissenting opinion, stated very positively that the conclusion of the majority was "in head-on collision" with the Federal Constitution.

Appellant's Claims That Federal Questions Are Involved Is Well Founded as Well as Substantial

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We respectfully submit that the decisions of this Court are conclusive that the present issues not only present federal questions, but that they are each of them substantial.

Obviously, the issue presented in this suit in Ohio by appellee's demurrer involved the statutes and laws of Florida. The judgment below sustaining the demurrer and dismissing plaintiff's action rested on these Florida statutes and laws. Obviously, while presuming to apply

the Florida statutes and laws and while claiming that it was required and obligated to do so by the mandate of its own legislature, the Court below concededly did not give to these Florida statutes and laws the effect which by law and usage they had in Florida.

This Court has held in numerous instances that the claim that the forum decided against the effect which appellant claimed the statutes of a sister state had by law and usage in the state of their enactment "clearly presents a substantial question under the full faith and credit clause of the Constitution" (*Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389; *Adams v. Saenger, supra; Crapo v. Kelly, supra; Green v. Van Bushkirk, supra*).

Similarly, appellant's claim that the Due Process clause of the Federal Constitution was violated by the decision below, is supported by this Court's ruling in *Home Insurance Co. v. Dick*, 281 U. S. 397, 407, that "the objection that, as applied to contracts made and to be performed outside [of the forum] the statute violates the Federal Constitution, raises federal questions of substance [under the Due Process clause], and the existence of the federal claim is not disproved by saying that the statute or the one year provision in the policy, relates to the remedy and not to the substance".

We frankly admit that appellant's claim that the decision below impaired the obligation of plaintiff's contract, presents a debatable question, since we can point to no decision in this Court which has determined it in our favor. But the same proposition, founded on identical facts, was also presented to this Court in an analogous situation, in *Home Insurance Co. v. Dick, supra*, and was not there rejected. This Court there merely stated that it was not required to dispose of that question since the judgment was in any event being reversed for other reasons

(see p. 411 of that case). We suggest that even this is indicative of an honest and serious proposition, sufficient to withstand a motion to dismiss.

The Motion to Dismiss the Appeal Must Be Considered in the Light of All the Facts and of All the Florida Statutes as a Whole and Not Distributively

---

Respondent, in arguing his motion to dismiss, treats Florida's Sec. 4663-(1) as involving a separate and distinct proposition and Florida's Sec. 4648 as involving another separate and distinct proposition. Instead of quoting the latter section, he gives a supposed summary thereof and omits therefrom the internal reference, evidenced by the phrase "term *herein* limited", to the other sections of the statute, fixing 20 years (or any other number of years) within which the action may be commenced. He ignores the decision of the Supreme Court of Florida (*Van Deren v Lory, supra*) holding that these two sections must be read together and that, as a result, the action is not barred until the specified number of years have run from the time of defendant's return to Florida.

Having thus emasculated the statute, and having eliminated therefrom the connection of Sec. 4663-(1) and having ignored the Florida decision aforesaid, respondent argues that the forum is not required to give faith or credit to this statute of another state (Sec. 4648).

We respectfully submit that the forum may not divide into two what is in reality a single statute and, viewing the two parts of the statute distributively, and ignoring one of them, give to the other an application and effect different from that given to it by the state of its enactment;

to do so violates the Full Faith and Credit clause of the Federal Constitution.

We respectfully submit that "part of a fact or contract is not the truth" (*Eaton's Appeal*, 66 Pa. 483, 490); neither is part of the law either the truth or the law. We submit that for the forum to apply one part of a statute and to reject another part thereof is to give not "full" but only "some" credit to that statute and violates the pronouncement of this Court that what the Full Faith and Credit clause of the Constitution requires is that the forum shall give "not some but full faith and credit" (*Davis v. Davis*, 305 U. S. 32, 40.

In *Messersmith v. American Fidelity Co.*, 232 N. Y. 161, 166, Justice Cardozo said:

> "The character of a liability is not to be determined by analyzing the constituent acts which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole."

Respondent concedes that "in quite a number of states [which under their statutes are required to apply the statute of limitations of the state where the cause of action arose] the rule is different and their courts construe their borrowing statute to borrow not only the limitation statute of the foreign state, if shorter, but also their tolling statute". We appreciate the concession, but it is very much of an understatement. The fact is that the states are *unanimous* in that conclusion and that Ohio stands alone in its division of the two.

American Jurisprudence, Volume II, Sec. 197, page 514, discussing this very question states the principle to be:

> "All of the foregoing principles are subject to the indispensable preliminary factor that a statute

admitting the bar of another state should not be held to supply a defense if in fact the courts of such other state have not been in a position to afford relief."

We respectfully submit that to hold otherwise than as above quoted, would not only be a violation of the Full Faith and Credit clause of the Constitution, but would constitute a denial of Due Process under the Fourteenth Amendment.

Appellant Is Not Foreclosed as to Whether the Federal Questions Here Involved Are "Substantial"

Nor may it be held, as respondent argues, that the memorandum of this Court, dismissing the appeal in *Alropa v. Kirchwehm*, 313 U. S. 549, which memorandum recites no facts, forecloses the present appellant on the question whether the federal questions here presented are "substantial", since respondent specifically concedes that a number of facts, statutory and otherwise, are here present, which did not there exist: such as defendant's absence from the State of Florida, the application of Florida's Sec. 4648 to that fact, the division of opinion in the Court below, and a dissenting opinion specifically challenging the conclusion of the Supreme Court of Ohio as being "in head-on collision" with the Federal Constitution; all of which were absent in the Alropa case.

Respondent does not use the term *stare decisis*, but obviously he has that doctrine in mind as the basis of his argument. But this Court has ruled time and again that this doctrine does not apply under the present circumstances: "The general language of the opinion must be read *in connection with the facts*" (*Italics supplied*); "General language must be confined to the precise state of facts

with reference to which it was used" (*U. S. v. Eaton*, 169 U. S. 331, 348; *White v. Aronson*, 302 U. S. 16, 21; *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 381).

We respectfully submit that not only is the memorandum in the Alropa case bare of any recital of facts, but that the radical difference in the facts as above recited, makes it impossible in law to consider the Alropa memorandum as *stare decisis* on the issue in the present case: whether the federal questions involved are substantial.

Moreover, it will be remembered that the respondent concedes that the federal questions involved in the Alropa case were not properly presented in the Court below. In view of that fact, we respectfully suggest that all that this Court decided by the dismissal of the appeal in the Alropa case was that the question was not "properly presented" and was not "substantial" for the reason which this Court gave in *Dickson v. Luck Land Co., supra*, that a question is frivolous where it was "not in any way brought to the attention of the court below".

Other Observations of Respondent Which Are Erroneous

Respondent argues that the conclusion of the Court below was "for procedural purposes" and therefore presumably involves no federal question. The court will look in vain in the record for any procedural question upon which the parties differed, and defendant's demurrer, to which we have referred, does not suggest any. If by "procedural question" respondent refers to Ohio's Statute of Limitations, then we beg to reiterate that plaintiff requested the Court below to apply its own statute of limitations and that it refused to do so. When it undertook to apply the statute of limitations of Florida (or any statute

of a sister state for whatever reason) the Full Faith and Credit clause of the Constitution came into play and the Court was required to give such credit to that statute. This the Court below did not do.

Again, respondent argues that what the Court below did was to determine the character of defendant's obligation as it was under the law of the forum. That is not a correct statement of the effect of the decision. We took considerable pains in our Statement of Jurisdiction to show that the nature and character of defendant's obligation is exactly the same in Ohio as in Florida, and cited and quoted decisions of each State, showing that the nature of the obligation was, in fact and in law, as similar in the two states as two peas in a pod, even as to the terminology and expressions employed.

Respondent suggests that the decision below turned upon the forum's construction of a Florida statute and involves no federal question. This, also, we deny. There was no room here for statutory construction. The highest court of the State of Florida had already spoken on the subject and this left no room for doubt as to the construction, application and effect of the statute. What the Court below did was to refuse to give to the Florida statute that application and effect which Florida gave it by its law and usage and by its decisions. That is a federal question.

Appellee intimates that the decision of the Ohio court was merely a "mistaken application of the doctrine of Conflict of Laws". We beg to reiterate that we requested the forum to apply its own statute of limitations of 15 years and that it refused to do so, and we submit in answer to appellee's suggestion that where the forum *refuses to apply its own law*, considers itself compelled (by its own statute) to apply the law of a sister state, and while purporting to do so adopts a conclusion which is neither the

law of the forum nor that of the sister state, a question of full faith and credit is squarely presented.

We respectfully submit that the federal questions we present are each of them substantial, especially in the sense used by this Court; that they certainly are not frivolous; and that, since it is conceded by respondent that they were properly and timely raised in the Court below, that the motion to dismiss the appeal should be denied.

Respectfully submitted,
SIGMUND H. STEINBERG,
WILLIAM K. GARDNER,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,

Appellant,

vs.

J. A. KIRCHWEHM.

APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

WAYLAND K. SULLIVAN,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,

Appellant,

vs.

J. A. KIRCHWEHM,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

APPELLEE'S STATEMENT OPPOSING JURISDICTION.

I.

Jurisdictional Point Already Decided by This Court in a Companion Case.

Our first contention is that the jurisdictional point involved here has already been decided by this Court, adversely to appellant's right of appeal, in what might well be called the companion case of

Alropa Corp. v. *Kirchwehm* (1941), 313 U. S. p. 549, 85 L. Ed. p. 1514.

In the *Alropa* case, this same appellee, Kirchwehm, was sued in the Common Pleas Court of Clark County, Ohio, upon an identical cause of action arisen in Florida and growing out of his acceptance as grantee of a deed poll containing a clause that he assumed and agreed to pay an existing mortgage on the land. The cause of action accrued not later than July 29, 1927. Suit was not brought in Ohio until more than seven years later—December 5, 1934.

The Ohio Supreme Court held that for procedural purposes and in determining the propriety of a suit against Kirchwehm in an Ohio Court, the character of his obligation should be determined by the law of the forum of Ohio, and that under Ohio law this obligation was that of a simple contract in writing, only, and at the most.

It held further, that while the Ohio limitation period on simple contracts in writing is fifteen years (Sec. 11221 G. C. Ohio) yet the Florida limitation period on such contracts is five years only (Sec. 4663-2 C. G. L. Florida). Then in view of the mandate of Sec. 11234, G. C. Ohio, providing in substance that where a cause of action arising outside Ohio is sued on in Ohio, and the limitation period of the State of origin is less than that of Ohio, the cause shall be barred at the expiration of the lesser period, it proceeded to hold that the case against Kirchwehm should have been dismissed by the Ohio trial Court because not brought within five years after accrual of the cause of action, and it affirmed a judgment by the Ohio (intermediate) Court of Appeals which had directed the trial court so to do.

Alropa Corp v. *Kirchwehm,* (1941), 138 O. S. p. 30.

It is perhaps not out of place to note that although the name of the plaintiff in that case and of the one in this case are not the same, yet each has had the same general counsel, Messrs. Blanc & Steinberg of Philadelphia, Pa., who, after

losing the *Alropa* case, proceeded to sue Kirchwehm over again upon a practically identical cause of action, in the Court of Common Pleas of Cuyahoga County, Ohio, which is the present litigation.

But that was not until after they had attempted to appeal the *Alropa* case to this Court upon precisely the same alleged Federal constitutional grounds as are now being urged here. This Court dismissed that appeal. *Alropa Corp.* v. *Kirchwehm* (*supra*) 313 U. S. 549; 85 L. Ed. 1514.

This decision, we urge, should govern the case at bar. It is that the appeal should be dismissed for want of a "properly presented" "substantial" Federal question (quotations ours). While the decision is in memorandum form, and per curiam, nevertheless the Court was at pains to cite three groups of precedents as justifying the action taken.

The first two groups refer to mechanical defects in the appellate procedure, which have since been corrected in the record and procedure here, and would seem to have no bearing on the present controversy.

But the third group appears to define the requisites of such a "*substantial* Federal question" as will warrant this Court in reviewing a judgment of a State Court of last resort.

We comment briefly upon them;—

Johnson v. *New York Life Ins. Co.* (187 U. S. 491)—cited by this Court in the Alropa decision as "187 U. S. 491-496".

It is apparent that two questions were disposed of here; the first being procedural, to-wit, that it is too late to try to inject a Federal question into a State Court case by first setting it up in the petition for a writ of error. But the second, we urge, dealt with and decided whether there was, in fact, such a substantial Federal question in that record

as would impel this Court to take jurisdiction. We quote from Page 495:

> "The Supreme Court of Iowa did not fail to give due faith and credit to the notice law of New York, since it was fully (Page 496) considered, and the decision of the state courts of New York were called to its attention and cited in its opinion.—*Whether the Supreme Court of Iowa was correct in its consideration of the applicability of the New York notice statute to this policy was immaterial since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case.* (Citing Cases) To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.
>
> "The validity of the New York statute was not called in question. *The case turned upon its construction. This was not a Federal question.*" (Italics supplied.)

Kryger v. *Wilson, et al.*, 242 U. S. Page 171—cited by this Court in the Alropa decision "242 U. S. 171-176" and here we find that on Page 176 there is a discussion and determination of whether the issue presented to this Court there involved a "substantial" Federal question.

We quote from Page 176:

> "The most that the plaintiff in error can say is that the state court made a *mistaken application of the doctrine of the conflict of laws* in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned." Citing Finney *v.* Guy. (Italics supplied.)

And, lastly, *Finney* v. *Guy*, 189 U. S. 335, cited by this Court in the Alropa decision as "189 U. S. 335, 340".

And on Page 340, we find the following:

> "Whether a cause of action is stated in a pleading, is generally to be decided with reference to the law of the State where the action is pending. If the State Court holds that no cause of action is set forth in the pleading and that it is against the public policy of the State to permit an action for such a purpose, we should generally hold that there is no Federal question involved in such determination. The plaintiffs, however, urge that there is here an exception to that rule founded upon the considerations just stated, *and that if under the Minnesota law this action could be maintained, the Courts of Wisconsin are bound to entertain jurisdiction to the same extent.* It is not, however, the case that every decision regarding the proper construction of the statute of another state, involves a Federal question: Where the case turns upon the construction and not the validity of the statute, a decision of that question is not necessarily of a Federal character." Citing Johnson *v.* New York Life Insurance Co. (Italics supplied.)

So it would seem beyond question, we urge, that the Alropa decision, quite apart and aside from any defects in the procedure which might have been found there, was careful to include a third ground, to-wit, lack of a "substantial Federal question". Otherwise, it would not have cited the precedents in Group three in the manner in which it did.

On this point, appellant here, in his application for a rehearing before the Ohio Supreme Court, took the ground that as this Court found it had no jurisdiction over the *Alropa* case because of procedural defects in the record, therefore it had no power to decide anything else, and may not be presumed to have intended to do so. But that is exactly what this Court did in *Johnson* v. *New York Life Ins. Co.* (supra), 187 U. S. 491, 496. There, after deciding

first that the case was improperly in Court on account of procedural defects, it proceeded, nevertheless, to add the additional ground that the record exhibited no substantial Federal question.

Conclusion.

So we submit for this Court's consideration our conclusion that this attempted appeal as of right from the Ohio Supreme Court's judgment is as barren of any substantial Federal question as was opposing counsel's former attempted appeal in the *Alropa* case, and should therefore be likewise as summarily dismissed;—unless the additional allegation here that Kirchwehm, after accepting the deed poll in Florida but before any cause of action accrued against him thereon, departed from that State and never thereafter returned, injects into the record a substantial Federal question which was not there before.

II.

Kirchwehm's Absence from Florida.

It is true that Kirchwehm's absence from Florida was neither pleaded nor attempted to be proved in the *Alropa* case. It is further true that the high Courts of some of the States, declaring their own local law, hold that their so-called "borrowing" statutes similar to Sec. 11234 G. C. Ohio must be construed as borrowing not only the limitation statutes of the foreign States but also the foreign States' "tolling" statutes, while others hold to the contrary. Ohio is one of the latter. Ohio holds that its Section 11234 G. C. borrows the foreign States' statute of limitations on a foreign-arising cause of action, if shorter than ours, but does not borrow the foreign States' tolling statute. The

reasons for such an interpretation are expressed by Weygandt, C. J., in the case at bar as follows:

> "It is the plaintiff's theory that if Florida's shorter, five-year limitation is to be given effect here, her tolling statute must by implication be accorded equal recognition here. In other words, the plaintiff contends that the absence of the defendant from Florida tolls the statute of limitation in both Florida and Ohio irrespective of the defendant's presence in Ohio where he has been served with summons. However, a study of the previously quoted statutes of the two states discloses no implied legislative intention to give procedural effect to a so-called "absence" provision in a state in which a defendant is in fact present. It would indeed be an anomalous bit of logic to hold that although the defendant has been in Ohio and therefore subject to an action by the plaintiff in this forum, nevertheless the statute of limitation has been prevented from running against the plaintiff in Ohio for no other reason than that the defendant has been absent from Florida.
>
> This court is of the opinion that the single factual difference does not distinguish this from the Alropa case, supra."

Payne v. *Kirchwehm*, 141 O. S. 384 at 387 and 388.

And the same thought is expressed by Lloyd, J. in

Bowers v. *Holabird*, 51 O. A. 413

in the following language:

> "The statute of limitations is not a will-o-the-wisp that can fly from one state to another as fancy dictates. To hold that the Illinois limitation of ten years is superseded by the Ohio limitation of fifteen years, because the operation of the Illinois statute is suspended by Section 19, which requires the subtraction from the limitation period within which an action may be brought in that state of the time of absence therefrom prior to the expiration of the limitation, would create a strange paradox. If this construction were to be

adopted, then, since the Illinois and not the Ohio statute of limitations must be held to apply to the alleged cause of action of Bowers, Holabird, while continuing to reside in Ohio, and regardless of how many years beyond ten years he had resided therein, could not claim the benefit of either the Illinois or Ohio statute of limitations in an action brought against him on the note in Ohio. Bowers had ten years in which to prosecute his cause of action in the state of Ohio. For some reason he chose not to do so but to await the possible return of Holabird to Illinois. Now he is too late."

And, in fact, the only dissenting voice in Ohio which we can find is the decision of the Cuyahoga County Court of Appeals below—no opinion at all having been rendered, and the Presiding Judge, Leighley, dissenting.

In quite a number of States, as appellant notes, the rule is different and their Courts construe their borrowing statutes to borrow not only the limitation statute of the foreign State, if shorter, but also her tolling statute. But in not one of them, so far as we can find, is there the slightest suggestion that the matter is other than a purely local one, or that it involves however remotely any lurking constitutional or Federal question, and this regardless of whichever way the point has been decided in the particular jurisdiction.

The only claim which appellant seems to be offering on this branch of his jurisdictional statement is that while the Federal constitution permits Ohio to adopt into and as part of its own law the Florida statute of Limitations upon suits on simple contracts, if the suit is brought in Ohio, yet if it does so, there is a constitutional mandate that it must also adopt Florida Tolling Statute, 4648-4 G. C. L. Florida. But we find nothing either in appellant's statement supporting jurisdiction, or any of the precedents therein cited, to require such a conclusion; nor, in fact, does any legalistic theory seem to be advanced to countenance it.

Certainly when the Ohio Supreme Court construes Section 11234 G. C. Ohio as permitting the borrowing in a case such as this of the Florida statute of limitations on simple contracts, but does not require the contemporaneous borrowing of the Florida tolling statute, it is not declaring any Florida statute invalid;—it is not even to our minds construing any Florida statute, it is laying down a purely local rule as to the proper construction and application, for Ohio procedural purposes, of an enactment of the Ohio Legislature. The fact that State Courts of other jurisdictions may see fit to construe their own similar enactments differently is of no moment, certainly of no constitutional moment.

In the many Federal and State Court precedents cited by the Ohio Supreme Court in *Alropa Corp* v. *Kirchwehm*, 138 O. S. 30, to the point that when a legal document drawn and executed in one State is presented for suit in another, the determination of its legal status for the purpose of applying the statute of limitations of the forum, must be by the law of the forum, there is no suggestion by any of the respective Courts, or the litigants therein, that such a determination raises any Federal constitutional question.

Willard v. *Wood*, 4 Mackeys Reports 538 164 U. S. 502;
Coral Gables Inc. v. *Christopher*, 108 Vermont 414;
Mercers Estate, 330 Pa. 475;
Burns Mortgage Co. v. *Hardy*, 19 Fed. Supp. 827;
Alropa Corp. v. *Rossee*, 86 Fed. (2d) 118;
LeRoy v. *Beard*, 49 U. S. 451;
Mandru v. *Ashly*, 108 Md. 693.

And if we correctly appraise this Court's dismissal of the appeal in *Alropa* v. *Kirchwehm*, 313 U. S. p. 549, no such constitutional question is brought into the picture from the circumstance that the limitation law of the State of forum

is arrived at through the application of a borrowing statute passed by the legislature of the forum.

And if, as in this case, the Ohio courts have construed the Ohio borrowing statute, Section 11234 G. C. O., as requiring our Tribunals to borrow the Florida five-year statute of limitations on simple contracts but preclude their borrowing of the Florida tolling statute, we urge the matter is still one of purely local law, in the decision of which, no provision of the Federal constitution is offended or affected.

It is therefore respectfully submitted that the motion accompanying this statement to dismiss the appeal should be sustained and the appeal should be dismissed on the ground that the record fails to disclose any substantial Federal question.

Signed:

WAYLAND K. SULLIVAN,
JOSEPH M. MURPHY,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,

Appellant,

vs.

J. A. KIRCHWEHM,

Appellee.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

Now comes J. A. Kirchwehm, Appellee, by his counsel of record and moves this Hon. Court to dismiss this appeal heretofore allowed on July 17, 1943, by the Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, for the reason that the record fails to disclose the existence of any substantial Federal question raised thereby.

Signed:

WAYLAND K. SULLIVAN,
JOSEPH M. MURPHY,
JOHN M. COLE,
Attorneys for Appellee.

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In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 294

V. D. PAYNE,
Appellant.

vs.

J. A. KIRCHWEHM

Appeal From The Supreme Court of Ohio

PETITION FOR REHEARING OF APPEAL DISMISSED WITHOUT ORAL ARGUMENT

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PETITION FOR REHEARING OF APPEAL.

(Dismissed Without Oral Argument)

To the Honorable, the Judges of the Supreme Court of the United States:

Petitioner, V. D. Payne, appellant herein, by his attorneys, Sigmund H. Steinberg and William K. Gardner, respectfully prays that your Honorable Court grant a rehearing in the above matter, for the following reasons:—

I.

The appeal is from a judgment of the Supreme Court of Ohio, dismissing plaintiff's action on the ground that it was already barred by limitation.

The Supreme Court of Ohio, in reaching that conclusion, *refused* to apply the *Ohio* statute of limitations, under which the action was *not* yet barred, but insisted on applying, and held itself compelled by the legislation of its own State to apply, the statute of limitations of the State of Florida, where the action arose.

Concededly the present action was not barred under the Florida statutes as those statutes are applied and given effect by the decisions of the Supreme Court of Florida.

Although the Supreme Court of Ohio rested its decision squarely upon the Florida statutes, it refused to give them that application and effect which they had in Florida by law and usage and under the Florida decisions, under all of which the action was *not* barred. Instead the forum gave the Florida statute an application and effect entirely foreign and contrary thereto, and held that the action *was* barred under the Florida statutes.

II.

Speaking generally, the question involved in this appeal, insofar as it touches the full faith and credit clause of the Federal Constitution is: Where the forum voluntarily, and under the compulsion of the legislation of its own State, insists that its own statute of limitation is inapplicable and that the action is controlled by the statute of limitation of the State where the action arose, is it not then required to give to the latter statute that same *full* faith and credit as is commanded by this Constitutional provision and by the decisions of this Court construing it?

Speaking more particularly, the question involved in this appeal, insofar as it touches the aforesaid Constitutional provision, may be said to be: Where the forum (Ohio), because of legislative compulsion, refuses to apply its own statute of limitations, under which the action is not barred, and insists upon applying the statute of limitations of the State where the action arose (Florida), is it not then required to give to the statute of limitations of that State (Florida) the same application and effect which that statute has in the State of its enactment by law and usage, and under the decisions of the Supreme Court of that State, under which the action is not barred?

III.

Your Honorable Court, on October 11, 1943, entered the following order dismissing the appeal:—

> "*Per curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) Alaska Packers Associa-

tion v. Commission, 294 U.S. 532, 547; Pacific Insurance Co. v. Commission, 306 U.S. 493, 502; (2) Michigan Insurance Bank v. Eldred, 130 U.S. 693, 696; Platt v. Wilmot, 193 U.S. 602, 610; Guaranty Trust Co. v. U.S., 304 U.S. 126, 136."

Presumably the appeal was dismissed by your Honorable Court on the theory, occasionally expressed by your decisions, that a federal question is not substantial if "it may be put aside on mere citation of earlier decisions" (*Alton R. R. v. Illinois Com. Comm.*, 305 U.S. 548), since none of the decisions cited in the *per curiam* opinion in any way discuss what constitutes a "substantial federal question" or in any way militate against the decisions which are referred to and discussed in appellant's brief opposing motion to dismiss the appeal (pages 5 to 7 inclusive), which cases do define that term.

It is obvious that appellant did not make his position clear in the briefs which he heretofore filed, since the cases cited in the *per curiam* opinion do not in any way, even in the remotest degree, touch that aspect of the full faith and credit clause which appellant claims to have been violated by the decisions, and on the other hand all of them refer entirely, as we shall hereinafter demonstrate, to an aspect of the full faith and credit clause which is in no way involved in this appeal. We should have pointed out in our original briefs, as we shall now do briefly, that the full faith and credit clause of the Federal Constitution has two distinct objects and purposes in view, only one of which is involved in this appeal, in which event we are quite certain that this Court would not have dismissed the appeal on the basis of the decisions cited in the *per curiam* opinion which in no way refer to that particular aspect of this constitutional provision.

IV.

The full faith and credit clause of the Federal Constitution has a dual purpose and aspect:

In its *first* aspect this clause operates as a restraint on the general sovereignty of the state, and compels it, to a limited degree to subordinate its own statute and to apply the conflicting law of another state. Questions arise under this aspect of that provision where the forum insists on applying its own law and refuses to subordinate it in favor of the conflicting statute of another state, and the question then involved is whether the case falls within the compulsory range given to this provision by the decisions of this Court. Needless to say that decisions under this aspect of that Constitutional provision are not and cannot be involved in the instant appeal, for the reason that the forum did *not* apply its *own* statute of limitations. In fact, it was the forum that refused to apply its own statute, although appellant was entirely satisfied that it should do so.

The *second* purpose and aspect of this clause of the Federal Constitution comes into play and operation when the first has been passed, and only when the forum has undertaken, as in the instant case, to apply the statutes of another state and to predicate its decision thereon. In that event, "this provision of the Constitution establishes a rule of evidence." *(Anglo-American Prov. Co. v. Davis Prov. Co.,* 191 U.S. 373, 374; *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265, 292); it prescribes "a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending action as to the faith and credit to be given by the Court to the public acts, records and judicial proceedings of a state other than that in which the Court is sitting" *(Minn. v. North Sec. Co.* 194 U.S. 48, 72).

This Court has specifically held that where the forum has undertaken to apply the laws of another state and complaint is made that the forum did not give such statute the proper effect "the question for decision [by this Court] is whether the action in this case of the Texas State Court [forum] in dismissing the suit denied to that judgment [or statute] the *full* faith and credit which the Constitution commands" *(Adams v. Saenger*, 303 U.S. 59, 60).

The requirements of the rule, under this aspect of the full faith and credit clause of the Federal Constitution, have been so clearly defined by the decisions of this Court that there is no room for doubt. The rule requires the forum, when it does apply the statute of a sister state, to give to that statute the same application and effect as it has in the state of its enactment, as it has under the decisions of the Supreme Court of that state; that is: the same effect as these laws have by law and usage at home *(Chicago and Alton R. R. v. Wiggins*, 119 U.S. 615 (1886); *Milwaukee County v. White*, 296 U.S. 268 (1935)); such effect as is given to such statutes of the sister state by the decisions of that state in construing and applying them *(John Hancock Ins. Co. v. Yates*, 299 U. S. 178 (1936); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Eastern B. & L. Assn. v. Ebaugh, supra; Milwaukee County v. White, supra).*

No decision of this Court has ever deviated from the principle above enunciated, as to the character and degree of faith and credit which the forum is required to give the statute of the sister state when the forum does undertake to apply it, regardless of the circumstances under which this forum applied it, so long as the forum did apply the statute of another state.

It is obvious that any question in this appeal which

involves the full faith and credit clause must fall under this second aspect of that Constitutional provision, and so viewed it becomes crystal clear that the decisions cited in the *per curiam* opinion of your Honorable Court dismissing the appeal in no manner or degree touch the latter question, the only question involved in this appeal concerning that Constitutional provision, and on the contrary each of them refers specifically and entirely to questions arising under the first aspect of this provision, which is not in any way involved in this appeal.

V.

The decision of **Guarantee Trust Co. v. United States, 304 U.S. 126, 136,** cited in the *per curiam* opinion aforesaid, merely holds "that the rule which exempts the United States and the States from the operation of statutes of limitations * * * does not extend to a foreign sovereign suing in a state or federal court", which question, obviously, is not involved in the present appeal.

In the case of **Michigan Ins. Bank v. Eldred,** 130 U.S. 693, 696, cited in the *per curiam* opinion aforesaid, this Court held that the forum was not required to subordinate its conflicting statute of limitations for that of the state where the action arose, because "the only Statute of limitations applicable to such an action [personal action] *are the statutes of the state where the action is brought and not those of the state where the action arose*" and that "Statutes of Limitations * * * were 'laws of several states' which must under the Judiciary Act of September 24, 1789 c 20, Sec. 34 'be regarded as rules of decisions in trials at common law in the Courts of the United States in cases where they apply.'" **Platt v.**

Wilma, 193 U. S. 602, 610, cited in the *per curiam* opinion is to the same effect.

In **Alaska Packers Assn. v. The Commission** 294 U.S. 542, 547, and likewise in **Pacific Ins. Co. v. The Commission**, 306 U.S. 493, 502, both cited in the *per curiam* opinion, the State of California insisted on applying its own Workmen's Compensation Act and refused to apply that of another state (in one instance Alaska and in the other instance Massachusetts). Your Honorable Court there stated the question involved to be as follows:

> "The subject of our inquiry is therefore whether the full faith and credit clause requires the Statute of California to give effect to the Alaska Statute rather than its own";

and your Honorable Court concluded that the full faith and credit clause did not lay down "a rigid and literal" rule which required the forum at all times and regardless of circumstances to subordinate its own conflicting statute for that of another state, and further concluded that "it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another" (p. 547).

It is obvious that the four decisions cited in the *per curiam* opinion and last referred to, each dealt only with the duty of the forum, under that Constitutional provision, to subordinate its conflicting statute to that of a sister state, and held that none of these cases fell within that range of the provision which *compelled* subordination, and upheld the right of the forum to apply its own statute. Not one of these decisions deals with the question of the duty of the forum, when it has subordinated its *own* statute and when it has applied the statute of another state, to give to that latter statute the character

and degree of faith and credit required by that Constitutional provision and by the decisions of this Court construing it.

VI.

Appellant also should have stated in his Statement as to Jurisdiction and in his brief Opposing Motion to Dismiss that the decision of the Ohio Supreme Court in the instant case stands out as *a lone minority.* The *identical* question, arising under similar borrowing statutes, has been decided *uniformly* by both state and federal courts *contra* the instant decision.

The principle that applies to a foreign statute of limitations, containing a tolling by absence provision, is clearly stated in 37 *Corpus Juris,* p. 736, as follows:

> "In cases where it is sought to apply the statute of limitations of a foreign jurisdiction *the Court of the forum will apply the statute as a whole and deduct from the time of its running the period of absence from the State where the cause of action accrued* if that statute excluded such period."
>
> "In a case where the foreign statute of limitations is controlling, its construction by the Courts of the foreign jurisdiction *must* be accepted." (Italics ours)

This was expressly so held in the following cases:

Federal:

Martin v. Wilson, 120 Fed. 202, 206 (C. C. A. 7th);
Irving Nat'l Bank v. Law, 10 F. (2d) 721 (C. C. A. 2nd);*

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* Reversing itself (9 F. (2d) 536), upon having called to its attention decisions by the Court of Appeals of New York construing its statute. This aptly illustrates the conflict that will result among the federal courts if the Ohio decision in the instant case is not reversed.

McGrath v. Helena Rubenstein, Inc., 29 F. Supp. 822 (S. D. N. Y. 1939).

New York:

Hanna v. Stedman, 230 N. Y. 326, 130 N. E. 566;

Isenberg v. Ranier, 145 App. Div. 256, 130 N. Y. S. 27;

Mishawaka Woolen Co. v. Phillips, 156 N. Y. S. 778.

Minnesota:

Casey v. American Bridge Co., 116 Minn. 461, 134 S. W. 111.

Massachusetts:

John v. John, 307 Mass. 514, 30 N. E. (2d) 542.

Missouri:

Daniels v. Gallagher, 189 S. W. 644 (Mo. 1916).

Kansas:

Timmonds v. Messner, 109 Kan. 518, 200 P. 270.

Alabama:

Helton v. Turner, 228 Ala. 403, 153 So. 866, 868.

West Virginia:

Manufacturer's Trust Co. v Johnson, 115 W. Va. 607, 177 S. E. 448.

Wyoming:

Bonfield v. Price, 1 Wyo. 223.

Washington:

McElroy v. Gabes, 64 Wash. 249, 116 P. 845; 69 Wash. 669, 124 P. 1127.

Colorado:

Simon v. Wilner, 97 Colo. 178, 47 P. (2d) 406.

Oklahoma:

Fidelity & Deposit Co. v. Sheahan, 37 Okla. 702, 133 P. 228.

Other decisions *uniformly* have held that (aside from the tolling by absence provision of the foreign statute), where the forum, pursuant to its comity statute, applies the shorter limitation statute of the state where the cause of action arose, the forum must give it the *same* construction as given by the courts of the foreign jurisdiction, so that the action would *only* be barred in the forum if it would have been barred if commenced in the state in which the cause of action accrued:

11 *American Jurisprudence*, Sec. 197, p. 514.

New York:

Isenberg v. Ranier, supra;
Hanna v. Stedman, supra;
Klotz v. Angle, 220 N. Y. 347, 116 N. E. 24;
Dalyrymple v. Schwartz, 177 App. Div. 650, 164 N. Y. S. 496;
Whiting v. Miller, 188 App. Div. 825, 176 N. Y. S. 639.

Pennsylvania:

Mister v. Burkholder, 56 Pa. Super. 517.

Illinois:

Speich v. Atchison, etc. Ry., 178 Ill. App. 266.

Missouri:

Wojtylak v. Kansas etc. Co., 188 Mo. 260, 87 S. W. 506;
Christner v. Chicago etc. Co., 226 Mo. A. 220, 64 S. W. (2d) 752.

Federal:

Hilliard v. Pennsylvania R. R., 73 F. (2d) 473, (C. C. A. 6th 1934) *
B. & O. Ry. v. Reed, 223 Fed. 689 (C. C. A. 6th 1915) *

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* These cases involved the same Ohio comity statute, as in the instant case, and its predecessor. They were decided before the Ohio

In all of these cases the Court of last resort *actually* gave full faith and credit to the construction by the sister State of its statute of limitations without even considering it necessary to discuss the Constitutional question. Therefore, never before now was it necessary to invoke the aid of this Court. This case is one of first impression in this Court, and unless this Court settles the question by reversing the decision of the Ohio Supreme Court, the door will be left wide open for continued disregard of the full faith and credit clause of the Federal Constitution not only by Ohio, but also by any other courts that may see fit to follow it. The inevitable result will be confusion and conflict not only among the state courts, but also the federal courts. The question should be settled now when only one court is out of line with the well-established principles.

VII.

We therefore respectfully pray that your Honorable Court grant a rehearing of the appeal and on oral argument determine whether a forum which refuses to apply its own statute and insists on applying that of a sister state is exempt from the requirement of the full faith and credit clause and of the decisions of this Court that in doing so the forum give that statute the same application and effect which it has by law and usage in the state of its enactment.

And appellant will ever pray.

Respectfully submitted,

SIGMUND H. STEINBERG,

WILLIAM K. GARDNER,

Attorneys for Appellant.

Supreme Court decisions in the instant case and *Alropa v. Kirchwehm*, 138 Ohio S. 30, and were *contra* thereto.

We hereby certify that the aforegoing petition for rehearing is presented in good faith and not for delay.

SIGMUND H. STEINBERG,
WILLIAM K. GARDNER,
Attorneys for Appellant.

No. 294. PAYNE *v.* KIRCHWEHM. Appeal from the Supreme Court of Ohio. October 11, 1943. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. (1) *Alaska Packers Assn.* v. *Industrial Commission,* 294 U. S. 532, 547; *Pacific Insurance Co.* v. *Industrial Commission,* 306 U. S. 493, 502; (2) *Michigan Insurance Bank* v. *Eldred,* 130 U. S. 693, 696; *Platt* v. *Wilmot,* 193 U. S. 602, 610; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 136. *Messrs. Sigmund H. Steinberg* and *William K. Gardner* for appellant. *Mr. Wayland K. Sullivan* for appellee. Reported below: 141 Ohio St. 384, 48 N. E. 2d 224.